

No. 14157

United States
Court of Appeals
for the Ninth Circuit

VICTOR F. GOTHBERG, an Individual, Doing
Business as Gothberg Construction Company,
Appellant,

vs.

IRENE ARNOLD,

Appellee;

SULLENS & HOSS, INC., a Corporation,

Appellant,

vs.

IRENE ARNOLD,

Appellee;

UNITED STATES OF AMERICA,

Appellant,

vs.

IRENE ARNOLD,

Appellee.

Transcript of Record

Appeals from the District Court
for the Territory of Alaska
Third Division

FILED

AUG 31 1954

PAUL P. O'BRIEN
CLERK

No. 14157

United States
Court of Appeals
for the Ninth Circuit

VICTOR F. GOTHBERG, an Individual, Doing
Business as Gothberg Construction Company,
Appellant,

vs.

IRENE ARNOLD,

Appellee;

SULLENS & HOSS, INC., a Corporation,
Appellant,

vs.

IRENE ARNOLD,

Appellee;

UNITED STATES OF AMERICA,
Appellant,

vs.

IRENE ARNOLD,

Appellee.

Transcript of Record

Appeals from the District Court
for the Territory of Alaska
Third Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Attorneys of Record	1
Certificate of Clerk to Record on Appeal	86
Findings of Fact and Conclusions of Law	25
Judgment	30
Notice of Appeal by Victor F. Gothberg	33
Notice of Appeal by Sullens & Hoss, Inc.	34
Opinion	21
Order Extending Time to File and Docket Record on Appeal, Filed November 7, 1953	35
Order Further Extending Time to File and Docket Record on Appeal, Filed November 25, 1953	36
Statement of Facts	3
Statement of Points on Which Appellant Gothberg Intends to Rely on Appeal	88
Statement of Points Upon Which Appellant Sullens & Hoss, Inc., Relies for Reversal on Appeal	91
Transcript of Proceedings	39
Witnesses, Plaintiff's:	
Arnold, Irene	
—direct	64
—cross	80
—redirect	84
—recross	85

ATTORNEYS OF RECORD

JULIANA D. WILSON,
P. O. Box 1333,
Anchorage, Alaska,
Attorney for Plaintiff.

BELL & SANDERS,
P. O. Box 1599,
Anchorage, Alaska;

DAVIS, RENFREW & HUGHES,
P. O. Box 477,
Anchorage, Alaska;

ARTHUR D. TALBOT,
Assistant United States Attorney,
Anchorage, Alaska;
Attorneys for Defendants.

In the District Court for the Territory of Alaska,
Third Division

No. A-7261

IRENE ARNOLD,

Plaintiff,

vs.

ALICE ROBERTS KELSEY and R. W. KELSEY,
Husband and Wife, et al.,

Defendants.

STATEMENT OF FACTS

The following statement of facts was compiled from the records of the Clerk of the District Court for the Territory of Alaska, Third Division, and the office of the U. S. Commissioner, Anchorage Recording Precinct, Territory of Alaska, and reflects all liens and encumbrances of record against the following-described real property:

Lots Eight (8) and Nine (9) in Tract A of the Hillstrand Subdivision of the North Half of the Northwest Quarter of the Southeast Quarter of the Southeast Quarter of Section 24, Township 13 North, Range 4 West, Seaward Meridian, Alaska, according to the map and plat thereof on file with the United States Commissioner's Office, at Anchorage, Alaska.

A. Alice Roberts Kelsey and R. W. Kelsey

I.

That at the times mentioned in plaintiff's complaint, the defendant, Alice Roberts Kelsey, was the

record owner, and R. W. Kelsey was the reputed owner of the above-described real property.

II.

That on the 25th day of January, 1952, the said R. W. Kelsey and Alice Roberts Kelsey were duly adjudged bankrupts by the above-entitled Court.

III.

That on the 1st day of May, 1952, Irene Arnold was appointed Trustee of said bankrupts' estate, and she ever since has been, and now is such Trustee.

B. Irene Arnold

I.

That on or about the 17th day of September, 1949, in the City of Anchorage, Third Division, Territory of Alaska, the defendant, Alice Roberts Kelsey, made, executed and delivered to the plaintiff her real mortgage, dated September 17, 1949, to secure the payment of the sum of Five Thousand Dollars (\$5,000.00), loaned by said plaintiff to said defendant, together with interest at the rate of eight per cent (8%) per annum, payable on or before December 17, 1950, which was given up on the above-described property; that said mortgage was recorded in the office of the U. S. Commissioner, Anchorage Precinct, Alaska, on the 20th day of September, 1949, in Book 84 at page 66, of the City Records.

II.

That on or about the 22nd day of December, 1950, at Anchorage, Alaska, the defendants, Alice Roberts

Kelsey and R. W. Kelsey, in order to give security for additional loans advanced by the plaintiff to the said defendants, and in order to consolidate these amounts with the sum of Five Thousand Dollars (\$5,000.00), previously secured by said mortgage dated the 17th day of September, 1949, made, executed and delivered to the plaintiff their certain promissory note in writing, bearing date on that day, in the sum of \$16,609.51.

III.

That in order to secure the payment of the said promissory note, and the interest thereon, the defendants on the 22nd day of December, 1950, made, executed and delivered to the plaintiff their Real Estate Mortgage bearing date of that day to secure the payment of the sum of Sixteen Thousand Six Hundred Nine and 51/100 Dollars (\$16,609.51), loaned by said plaintiff to the said defendants, together with interest at the rate of eight per cent (8%) per annum, payable at the rate of \$350.00 per month, plus interest, until paid in full; that said mortgage was recorded in the office of the U. S. Commissioner, Anchorage Precinct, Alaska, in Book 107 at Page 187, on the 16th day of January, 1951.

IV.

That no part of the principal and interest mentioned in said note and mortgage has been paid, save and except the sum of One Thousand Nine Hundred Fifty-five and 13/100 Dollars (\$1,955.13); that there is still due and owing from the said defendants to

the plaintiff the sum of Fifteen Thousand Three Hundred Forty-four and 81/100 Dollars (\$15,344.-81), together with interest thereon at the rate of eight per cent (8%) per annum from the 3rd day of July, 1951, as evidenced by Civil Case No. A-7261.

C. Heinie Berger

I.

On December 14, 1950, R. W. Kelsey and Alice Roberts Kelsey, defendants, executed and delivered to Heinie Berger a written promissory note in the amount of \$1,959.22, which sum bore interest at the rate of eight per cent (8%) per annum from date.

II.

That in order to secure the payment of the said promissory note, and the interest thereon, the defendants on the 14th day of December, 1950, made, executed and delivered to the said Heinie Berger their Real Estate Mortgage upon the above-described real property; that said mortgage was recorded in the office of the U. S. Commissioner, Anchorage Precinct, Alaska, in Book 53 at Page 291, on the 19th day of December, 1950.

III.

That no part of the debt evidenced by said note and mortagage has been paid; that said promissory note and mortgagage are now in default.

D. Ketchikan Spruce Mills

I.

Ketchikan Spruce Mills is a corporation organized

and existing under the laws of the Territory of Alaska.

II.

That Ketchikan Spruce Mills, at the instance and request of Alice Roberts Kelsey and Royal W. Kelsey, furnished material which was used upon the above-described property; that the reasonable value of said material is \$250.00, and the last of it was furnished November 26, 1949.

III.

That on the 21st day of February, 1950, and within ninety (90) days after the last day materials were furnished, Ketchikan Spruce Mills duly filed for record and caused to be recorded in the office of the U. S. Commissioner, Anchorage Recording Precinct, a statement of lien against the above-described property, which lien was duly recorded in Book 88 at Page 140, of Precinct records.

IV.

That on April 26, 1950, said Ketchikan Spruce Mills filed an action in the above-entitled Court to foreclose said lein, being cause No. 6132; that the complaint in said action prayed for recovery of the sum of \$250.00 plus interest at the rate of six per cent (6%) per annum from November 26, 1949; \$18.75 for preparing and filing said lien; costs and disbursements and a reasonable attorney's fee.

V.

No part of said lien or of the monies prayed for in said Civil Action No. A-6132 has been paid, and

all of the same is now due and owing to the said Ketchikan Spruce Mills.

E. Kincaid & King Construction Co., Inc.

I.

Kincaid & King Construction Co., Inc., is a corporation organized and existing under the laws of the Territory of Alaska.

II.

That Kincaid & King Construction Co., Inc., at the instance and request of Alice Roberts Kelsey and Royal W. Kelsey, furnished materials which were used in the construction of the building upon the above-described real property; that the reasonable value of said materials is \$474.00, and the same was furnished between August 24, 1950, and October 28, 1950.

III.

That no part of said sum has been paid, save and except the sum of \$50.00, and a credit of \$15.75 was allowed the said defendants on materials returned, leaving a balance due and owing of \$408.25.

IV.

That on the 26th day of January, 1951, and within ninety (90) days after the last day upon which materials were furnished, Kincaid & King Construction Co., Inc., duly filed for record and caused to be recorded in the office of the U. S. Commissioner, Anchorage Recording Precinct, a statement of lien against the above-described property, which lien was duly recorded in Book 108 at Page 22 of City Records.

V.

That on July 24, 1951, said Kincaid & King Construction Co., Inc., filed an action in the above-entitled Court to foreclose said lien, being cause No. A-7063; that the complaint in said action prayed for recovery of the sum of \$408.25 plus interest at the rate of six per cent (6%) per annum from October 28, 1950; \$20.00 for preparation and recording of statement of lien; costs and disbursements and a reasonable attorney's fee.

VI.

No part of said lien or of the monies prayed for in said Civil Action No. A-7063 has been paid, and all of the same is now due and owing to the said Kincaid & King Construction Co., Inc.

F. D. H. Cuddy, Trustee

I.

On August 13, 1951, R. W. Kelsey and Alice Roberts Kelsey, defendants, executed and delivered to D. H. Cuddy, Trustee for Pat Ryan, Erma Schuler, V. W. Garrison and The Alaska Plumbing & Heating Co., Inc., a written promissory note in the amount of \$4,131.00, which sum bore interest at the rate of eight per cent (8%) per annum from date.

II.

That in order to secure the payment of the said promissory note, and the interest thereon, the defendants on the 13th day of August, 1951, made, executed and delivered to the said D. H. Cuddy,

Trustee, their Real Estate Mortgage upon the above-described real property; that said mortgage was recorded in the office of the U. S. Commissioner, Anchorage Precinct, Alaska, in Book 117 at Page 197, of City Records, on the 16th day of August, 1951.

III.

That no part of the debt evidenced by said note and mortgage has been paid; that said promissory note and mortgage are now in default.

G. Kenneth W. Luse

I.

That Kenneth W. Luse, an individual, doing business as Ken Luse & Company, at the instance and request of Royal W. Kelsey, and with the full knowledge of Alice Roberts Kelsey, furnished labor, materials and supplies for painting and decorating apartments located upon the above-described property; that the reasonable value of said services and materials is \$2,375.05, and the same were furnished between May 19, 1951, and July 28, 1951.

II.

That on the 14th day of August, 1951, and within ninety (90) days after the last day upon which said services and materials were furnished, Kenneth W. Luse duly filed for record and caused to be recorded in the office of the U. S. Commissioner, Anchorage Recording Precinct, a statement of lien against the above-described property, which lien was duly recorded in Book 117 at Page 162, of City Records.

III.

That on December . . , 1951, said Kenneth W. Luse filed a Cross-Complaint in the above-entitled action to foreclose said lien; that the Cross-Complaint prayed for recovery of the sum of \$2,375.05, plus interest thereon at the rate of six per cent (6%) per annum from July 28, 1951; \$21.00 for preparing and filing said lien; costs and disbursements and a reasonable attorney's fee.

IV.

No part of said lien or of the monies prayed for in said Civil Action No. A-7261 has been paid, and all of the same is now due and owing to the said Kenneth W. Luse.

H. William Stolt and Lilian Stolt

I.

That William Stolt and Lilian Stolt, doing business as Bill's Electric Supply and Service Shop, at the instance and request of Royal W. Kelsey, and with full knowledge of Alice Roberts Kelsey, furnished labor, materials and supplies in electrical installations in the apartments and improvements upon the above-described property; that the reasonable value of said services and materials is \$140.18, and the same were furnished between July 17, 1951, and July 19, 1951.

II.

That on the 12th day of October, 1951, and within ninety (90) days after the last day upon which said services and materials were furnished. William

Stolt and Lilian Stolt duly filed for record and caused to be recorded in the office of the U. S. Commissioner, Anchorage Recording Precinct, a statement of lien against the above-described property, which lien was duly recorded in Book 120 at Page 339, of City Records.

III.

That on January . . , 1952, said William Stolt and Lilian Stolt filed a Cross-Complaint in the above-entitled action to foreclose said lien; that the Cross-Complaint prayed for recovery of the sum of \$140.18 plus interest at the rate of six per cent (6%) per annum from July 19, 1951; \$21.50 for the preparation and recording of the statement of lien; costs and disbursements and a reasonable attorney's fee.

IV.

That no part of said lien or of the monies prayed for in said Civil Action No. A-7261 has been paid, and all of the same is now due and owing to the said William Stolt and Lilian Stolt.

I. Henry F. Wollf, Inc.

I.

Henry F. Wollf, Inc., is a corporation organized and existing under the laws of the Territory of Alaska.

II.

That Henry F. Wollf, Inc., at the instance and request of Royal W. Kelsey, and with full knowledge of Alice Roberts Kelsey, furnished materials in the construction, improvement or repair of cer-

tain apartments upon the above-described property; that the reasonable value of said materials is \$1,166.11, and the same were furnished between July 11, 1951, and July 28, 1951.

III.

That no part of said sum has been paid, but the account has been credited with the sum of \$600.00 for equipment purchased by Henry F. Wolff, Inc., from said defendants, leaving a balance due and owing of \$566.11.

IV.

That on the 20th day of October, 1951, and within ninety (90) days after the last day upon which materials were furnished, Henry F. Wolff, Inc., duly filed for record and caused to be recorded in the office of the U. S. Commissioner, Anchorage Recording Precinct, a statement of lien against the above-described property, which lien was duly recorded in Book 121 at Page 71. of City Records.

V.

That on December . . ., 1951, said Henry F. Wolff, Inc., filed a Cross-Complaint in the above-entitled action to foreclose said lien; that the Cross-Complaint prayed for recovery of the sum of \$566.11, plus interest thereon at the rate of six per cent (6%) per annum from July 28, 1951; \$18.75 for preparing and filing said lien; costs and disbursements and a reasonable attorney's fee.

VI.

No part of said lien or of the monies prayed for in said Civil Action No. A-7261 has been paid, and

all of the same is now due and owing to the said Henry F. Wollf, Inc.

J. Henry W. Cuffel

I.

That on the 21st day of August, 1951, Henry W. Cuffel, an individual, doing business as Northern Neon Sign Company, filed an action in the above-entitled Court against the defendants, R. W. Kelsey and Alice Roberts Kelsey, to recover the sum of \$1,240.00 due upon a conditional sales contract; that said action is Cause No. A-7131.

II.

That by virtue of a Writ of Attachment issued by the above-entitled Court in said action, the U. S. Marshal for the Third Division, Territory of Alaska, attached the above-described real property belonging to said defendants and caused a Certificate of Attachment of property to be filed in the U. S. Commissioner's office, Anchorage Recording Precinct, and recorded in Book 115 at Page 256, of City Records, on August 21, 1951.

III.

That no part of the monies prayed for in said Civil Action No. 7131 has been paid, and all of the same is now due and owing to the said Henry W. Cuffel.

K. Victor F. Gothberg

I.

That Victor F. Gothberg, an individual doing business as Gothberg Construction Company, at the

special instance and request of the defendant R. W. Kelsey and with the knowledge and consent of the defendant Alice Roberts Kelsey, furnished certain building materials for use in the construction, alteration and repair of the building located upon the above-described real property; that the reasonable value of said materials is \$2,005.24, and the same were furnished on or about the 15th day of September, 1951.

II.

That on the 20th day of November, 1951, and within ninety (90) days after the last day upon which said materials were furnished, Victor F. Gothberg duly filed for record and caused to be recorded in the office of the U. S. Commissioner, Anchorage Recording Precinct, a statement of lien against the above-described property, which lien was duly recorded in Book 123 at Page 92 of City Records.

III.

That on December 14, 1951, said Victor F. Gothberg filed a Cross-Complaint in the above-entitled action to foreclose said lien; that the Cross-Complaint prayed for recovery of the sum of \$2,005.24 plus interest thereon at the rate of six per cent (6%) per annum from October 15, 1951; \$14.00 for the preparation and recording of the statement of lien; costs and disbursements and a reasonable attorney's fee.

IV.

That no part of said lien or of the monies prayed

for in said Civil Action No. A-7261 has been paid, and all of the same is now due and owing to the said Victor F. Gothberg.

L. United States of America

I.

That on the 16th day of July, 1952, the United States of America filed its Notice of Tax Lien in the sum of \$18,335.57 against the defendants, R. W. Kelsey and Alice Roberts Kelsey, and the above-described property, for delinquent income taxes, the same being Commissioner's No. 1621.

II.

That on the 2nd day of September, 1952, the United States of America filed its Notice of Tax Lien in the sum of \$710.87 against the defendants, R. W. Kelsey and Alice Roberts Kelsey, and the above-described property, for delinquent withholding taxes and FICA, the same being Commissioner's No. 1638.

III.

That no part of said liens has been paid, and all of the same is now due and owing to the said United States of America.

M. R. T. Schultz and J. R. Peck

I.

That R. T. Schultz and J. R. Peck on the 10th day of October, 1951, secured a judgment against the defendants, R. W. Kelsey and Alice Kelsey, in the District Court for the Territory of Alaska,

Third Division, No. A-6899 in the amount of \$939.37 plus interest on that sum at the rate of six per cent (6%) per annum from the 18th day of May, 1951, together with costs and disbursements in such action incurred including an attorney's fee allowed by the court in the sum of \$250.00.

II.

That the judgment secured by R. T. Schultz and J. R. Peck as above set forth was filed for record in the office of the U. S. Commissioner, Anchorage Recording Precinct, on the 10th day of October, 1951, which was within the four months' period immediately preceding the date on which the said R. W. Kelsey and Alice Roberts Kelsey were adjudged bankrupts.

III.

That no part of the monies prayed for in said Civil Action No. 6899 has been paid, and all of the same is now due and owing to the said R. T. Schultz and J. R. Peck.

N. Sullens & Hoss, Inc.

I.

That on the 9th day of December, 1949, in the District Court for the Territory of Alaska, Third Judicial Division, Sullens & Hoss, Inc., was awarded judgment against the Western American Dredging Corporation, Spenard Lumber Company, and Thomas Kelsey in the sum of \$1,676.89 principal, \$125.70 interest, \$240.00 attorney's fees, and a further sum of \$30.00 court costs incurred in that ac-

tion, which was No. 5504; that the said Thomas Kelsey referred to in the above-mentioned judgment is one and the same person as R. W. Kelsey.

II.

That the above-mentioned judgment has never been docketed in the office of the U. S. Commissioner and ex-Officio Recorder for the Anchorage Precinct, Territory of Alaska.

III.

That no part of the monies prayed for in said Civil Action No. 5504 has been paid, and all of the same is now due and owing to the said Sullens & Hoss, Inc.

IV.

That Sullens & Hoss, Inc., at the special instance and request of R. W. Kelsey and Alice Roberts Kelsey, furnished lumber and building material used upon the above-described property; that the reasonable value of said materials is \$442.50, and the same were furnished between July 5, 1951, and July 24, 1951.

V.

That the sum of \$90.00 has been paid, leaving a balance of \$352.50; that on the 31st day of August, 1951, and within ninety (90) days after the last day upon which materials were furnished, Sullens & Hoss, Inc., duly filed for record and caused to be recorded in the office of the U. S. Commissioner, Anchorage Recording Precinct, a statement of lien against the above-described property, which lien was

duly recorded in Book 118 at Page 8 of City Records.

VI.

That during the month of September, 1951, the defendants, R. W. Kelsey and Alice Roberts Kelsey, paid to Sullens & Hoss, Inc., the sum of \$376.57.

VII.

That on November 14, 1951, said Sullens & Hoss, Inc., filed a Cross-Complaint in the above-entitled action to collect said judgment and foreclose said lien; that said Cross-Complaint alleged that the payment of \$376.57 should be applied against the judgment entered in Cause No. 5504; that it should recover the sum of \$1,685.13 plus interest at the rate of six per cent (6%) per annum from the 9th day of December, 1949, upon said judgment; that it should recover the sum of \$352.50 upon said lien, together with interest at the rate of six per cent (6%) per annum from the 31st day of August, 1951, and the further sum of \$3.75, the cost of filing the lien of record; for costs and a reasonable attorney's fee.

VIII.

That the payment made by the defendants during the month of September, 1951, was in payment of the lien filed against the above-entitled property.

O. General

I.

That the following persons or firms have filed notices of liens against the above-described prop-

erty with the U. S. Commissioner and ex-Officio Recorder for the Anchorage Recording Precinct, Territory of Alaska, and constitute a cloud upon the title to the above-described property, but no action has been instituted within six months from the date of filing, as required by law:

Name	Dated Filed	Amount
Alaska Art Tile & Alaska		
Building Supply	9/13/49	\$ 220.50
North Star Appliance.....	10/12/51	1071.00
J. C. Floor Covering.....	10/23/51	182.07
Anchorage Sash and Door.....	11/10/51	97.00
William Olday*	12/ 6/51	120.00
William Olday*	12/ 6/51	110.00

*One of these has been paid.

II.

That judgment in favor of the City of Anchorage and against R. W. Kelsey was entered in Case No. 4-360, U. S. Commissioner's Court, Anchorage Precinct, on September 24, 1951, for the sum of \$257.12 principal, \$25.00 for attorney's fees and \$18.20 court costs; that said judgment is docketed in JD 3 at Page 14 of the records of the U. S. Commissioner.

III.

That judgment in favor of Rodney H. Vore and Marie Vore and against R. W. Kelsey and Alice Roberts Kelsey was entered in Case No. 4-370, U. S. Commissioner's Court, Anchorage Precinct, Territory of Alaska, on October 24, 1951, for the sum of

\$290.00 plus interest thereon at the rate of six per cent (6%) per annum from September 1, 1951, until paid, \$43.50 for attorney's fees and \$22.60 court costs; that said judgment is docketed in JD 3 at Page 31 of the records of the U. S. Commissioner.

Submitted this 9th day of June, 1953.

/s/ J. L. McCARREY, JR.,

Attorney for Irene Arnold, Bill's Electric Supply and Service Shop, Ken Luse & Company, Henry F. Wolff, Inc., and Kincaid & King Construction Co., Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed June 9, 1953.

[Title of District Court and Cause.]

OPINION

Filed August 27, 1953

J. L. McCARREY, JR.,
Attorney for Plaintiff.

CUDDY & DUNN,
Attorneys for Heine Berger, Ketchikan Spruce Mills, D. H. Cuddy, Trustee.

J. L. McCARREY, JR.,
Attorney for Kincaid & King Construction Co., Inc.; Ken Luse & Company; William Stolt and Lilian Stolt.

BELL & SANDERS,

Attorneys for Sullens & Hoss.

DAVIS, RENFREW & HUGHES,

Attorneys for Victor F. Gothberg, R. T. Schultz and J. R. Peck.

KAY, ROBISON & MOODY,

Attorneys for William Olday and Henry W. Cuffel.

EVANDER C. SMITH,

Attorney for J. C. Floor Covering.

SEABORN J. BUCKALEW,

U. S. Attorney, and

ARTHUR D. TALBOT,

Assistant U. S. Attorney for the United States.

This suit for the foreclosure of plaintiff's mortgage against the real property of the defendants, Alice and R. W. Kelsey, husband and wife, involves the rank and priority of the mortgage lien and the liens claimed against the same property by the other defendants. The principal contest is between the lien of the mortgage given the plaintiff by the defendant, Alice Kelsey, and the lien of the judgment of the defendant, Sullens & Hoss.

It appears that on September 17, 1949, the defendant, Alice Kelsey, record owner, gave the plaintiff a mortgage on the property involved to secure a loan of \$5,000 which was later consolidated with other loans aggregating \$16,609.51, for which another mortgage was given the plaintiff by the Kel-

seys. On December 9, 1949, the defendant Sullens & Hoss obtained a judgment for \$1,676.89 in this court against the Western Dredging Corporation, Spenard Lumber Company and the defendant R. W. Kelsey. On January 25, 1952, the Kelseys were adjudged to be bankrupts.

The plaintiff contends that the judgment lien was not perfected because a transcript of the docket entry thereof was not filed in the office of the Recorder for Anchorage Precinct, whereas the defendant Sullens & Hoss contends that it is only when the judgment creditor desires to subject to his lien property situate elsewhere in the Territory than in the Division in which the judgment is entered, that the transcript must be filed in the particular recording district, in accordance with the provision of Section 55-9-61 ACLA 1949. I am of the opinion that the construction urged upon the Court by the defendant is the correct one. This view finds further support in the construction given the statute by the Courts of Oregon, from which the statute was taken, *Creighton v. Leeds*, 9 Or. 215 (1881). In any event the judgment obtained by Sullens & Hoss is not a lien against the property involved in this action since Alice Kelsey, the record owner of the property, was not a party to the suit in which the Sullens and Hoss judgment was obtained.

The contention has been made that the first mortgage is invalid, and hence that liens of other creditors arising before the filing of the second mortgage are superior to the entire debt owed the plaintiff.

Such invalidity is claimed on the ground that the mortgage was not signed by the husband of the mortgagor, Alice Kelsey—a prerequisite under Sec. 22-3-1 ACLA 1949 to the validity of a conveyance of property which includes the homestead. Assuming that a mortgage is a conveyance and that the property was used in part as a home by the Kelseys, Cf. *Wendler v. Brennaman*, 7 Alaska 13, it nevertheless appears to be the law that the objection interposed is not available to a third person but only to the possessor of the homestead right. *Davis v. Low*, 135 Pac. 314 (Or.); 5 *Tiffany on Real Property* 154. And this rule is not affected by adjudication in bankruptcy. 11 USCA 24.

It is also contended that the mortgage of September 17, 1949, was extinguished by the later mortgage. I find, however, that there was no release or satisfaction of the lien of the first mortgage; that there was merely a consolidation of the loans and the taking of the new mortgage, with no intention that the lien of the first mortgage should be relinquished, and hence conclude, in the absence of any showing of prejudice, that there was no extinguishment, *Griffin v. International Trust Co.*, 169 Fed. 48 (9th Cir.); that the plaintiff's lien of \$5,000 is entitled to priority over all other liens, and that the remaining liens and claims should be paid in the following order:

1. Ketchikan Spruce Mills.
2. Kincaid & King.
3. H. Berger.

4. Irene Arnold.
5. Wm. & L. Stolt.
6. Ken Luse, Henry Wolff, Inc., equal rank.
7. Dan Cuddy, Trustee.
8. Henry W. Cuffel.
9. R. H. & Marie Vore.
10. V. Gothberg.
11. City of Anchorage.
12. R. T. Schultz & J. R. Peck.
13. United States.
14. United States.

I further find from the uncontradicted testimony of the plaintiff that the payment of \$376.57 to the defendant Sullens & Hoss was applied on its lien of July 24, 1951.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed August 27, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing in open court on the 29th day of June, 1953, upon presentation of Statement of Facts submitted by J. L. McCarrey, Jr., attorney for plaintiff; the plaintiff, Irene Arnold, was present in court and represented by J. L. McCarrey, Jr., her counsel; the defendants, Alice Roberts Kelsey and R. W. Kelsey,

neither appeared in person nor were they represented by counsel; that personal service was made upon said defendants on the day of October, 1951, according to law; that the defendants, Heine Berger, Ketchikan Spruce Mills, and D. H. Cuddy, Trustee, were represented by the firm of Cuddy & Dunn; that the defendants, William Olday and Henry W. Cuffel were represented by the firm of Kay, Robison and Moody; that the defendant, Sullens & Hoss, Inc., was represented by the firm of Bell & Sanders; that the defendants, Victor F. Gothberg, R. T. Schultz and J. R. Peck, were represented by the firm of Davis, Renfrew & Hughes; that the defendant, United States of America, was represented by the U. S. Attorney, Anchorage, Alaska; that the defendants, Kincaid & King Construction Co., Inc., Kenneth W. Luse, William Stolt and Lilian Stolt, and Henry F. Wolff, Inc., were represented by J. L. McCarrey, Jr. The Court proceeded to hear the evidence produced by the plaintiff in support of the Statement of Facts, and the evidence of the defendants, and being fully advised in the premises now makes the following Findings of Fact:

I.

That the Statement of Facts prepared by the plaintiff represents a true statement of the facts involved in this action.

II.

That the judgment obtained by Sullens & Hoss, Inc., is not a lien against the property involved in

this action since Alice Roberts Kelsey, the record owner of the property, was not a party to the suit in which the Sullens & Hoss, Inc., judgment was obtained.

III.

That the mortgage of September 17, 1949, given by Alice Roberts Kelsey to Irene Arnold, was not extinguished by the later mortgage of December 22, 1950, but remained in full force and effect.

IV.

That the payment of \$376.57 by the defendants Alice Roberts Kelsey and R. W. Kelsey to the defendant Sullens & Hoss, Inc., was applied on its lien of July 24, 1951.

V.

That the real property concerned in this action has been sold under a stipulation entered into by the parties hereto for the sum of \$35,000.00, which sum is being held subject to all the rights and claims the parties hereto previously had against the real property.

From the above and foregoing findings of fact, the Court enters the following, its

Conclusions of Law

I.

That the plaintiff's lien of \$5,000.00 is entitled to priority over all other liens, and that said liens and claims, together with interest and costs, should be paid in the following order:

Name	Principal	Interest	Filing Fee	Filing Lien	Marshal Fee	Attorney Fee
1. Irene Arnold	\$ 5,000.00	\$ 829.97	\$27.00	\$	\$28.80	\$941.50
2. Ketchikan Spruce Mills	250.00	56.50	27.00	3.75	58.50*	91.95
3. Kineaid & King Const. Co.	408.25	69.59	27.00	5.75	6.80	143.35
4. Heine Berger	1,959.22	424.49				507.56
5. Irene Arnold	10,344.81	1,784.07				392.58
6. William & Lilian Stolt	140.18	17.78		6.50	26.00	47.39
7. Kenneth W. Lause	2,375.05	298.40		6.00	26.00	551.02
Henry F. Wolff, Inc.	566.11	71.13		3.75	26.00	191.17
8. D. H. Cuddy, Trustee	4,131.00	677.87				871.33
9. Henry W. Cuffel	1,240.00					
10. R. H. and Marie Vore	290.00	34.80	22.60			43.50
11. Victor Gothberg	2,005.24	225.58				484.62
12. City of Anchorage	257.12	29.89	18.20			25.00
13. R. T. Schultz & J. R. Peck	939.37	128.92	27.00			250.00
14. United States	18,335.57					
15. United States	710.87					

*For Ketchikan, Berger and Cuddy.

II.

That the amounts and claims set forth in Paragraph I of these Conclusions of Law be paid from the sum of \$35,000.00 derived from the sale of the real property involved in this action, insofar as possible.

III.

That no other or further relief need be granted.

Done in Open Court at Anchorage, Alaska, this 4th day of September, 1953.

/s/ GEORGE W. FOLTA,

Judge of the District Court.

Receipt of copy acknowledged.

[Endorsed]: Filed September 4, 1953.

In the U. S. District Court for the District of
Alaska, Third Division

No. A-7261, A-6132, A-7063 and A-7131

Consolidated Actions

IRENE ARNOLD,

Plaintiff,

vs.

ALICE ROBERTS KELSEY and R. W. KELSEY, Husband and Wife; HEINE BERGER; ALASKA ART TILE AND BUILDING SUPPLY; KETCHIKAN SPRUCE MILLS; KINCAID & KING CONSTRUCTION CO., INC.; KEN LUSE & COMPANY; WILLIAM

STOLT and LILIAN STOLT, d/b/a BILL'S ELECTRIC SUPPLY AND SERVICE SHOP; D. H. CUDDY, Trustee for PAT RYAN, ERMA SCHULER, V. W. GARRISON and ALASKA PLUMBING AND HEATING CO., INC.; HENRY W. CUFFEL, d/b/a NORTHERN NEON SIGN CO.; SULLENS & HOSS, INC.; JOHN DOE and RICHARD ROE,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for hearing in open court on the 29th day of June, 1953, upon presentation of Statement of Facts submitted by J. L. McCarrey, Jr., attorney for plaintiff; the plaintiff, Irene Arnold, was present in court and represented by J. L. McCarrey, Jr., her counsel; the defendants, Alice Roberts Kelsey and R. W. Kelsey, neither appeared in person nor were they represented by counsel; that personal service was made upon said defendants on the 16th day of October, 1951, according to law, and that the default of said defendants for their failure to appear and plead to plaintiff's Complaint has been heretofore entered by this Court; that the defendants, Heine Berger, Ketchikan Spruce Mills, and D. H. Cuddy, Trustee, were represented by the firm of Cuddy & Dunn; that the defendants, William Olday and Henry W. Cuffel, were represented by the firm of Kay, Robison and Moody; that the defendant, Sul-

lens & Hoss, Inc., was represented by the firm of Bell & Sanders; that the defendants, Victor F. Gothberg, R. T. Schultz and J. R. Peck, were represented by the firm of Davis, Renfrew & Hughes; that the defendant, United States of America, was represented by the U. S. Attorney, Anchorage, Alaska; that the defendants, Kincaid & King Construction Co., Inc., Kenneth W. Luse, William Stolt and Lilian Stolt, and Henry F. Wolff, Inc., were represented by J. L. McCarrey, Jr.; and the Court, being fully advised in the premises, having heretofore made and filed herein its Findings of Fact and Conclusions of Law in this matter, and having directed that judgment be entered in accordance therewith:

Now, Therefore, by reason of the law and the findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That the plaintiff's lien of \$5,000.00 is entitled to priority over all other liens, and that said liens and claims, together with interest and costs, should be paid in the following order:

Name	Principal	Interest	Filing Fee	Filing Lien	Marshal Fee	Attorney Fee
1. Irene Arnold	\$ 5,000.00	\$ 829.97	\$27.00	\$	\$28.80	\$941.50
2. Ketchikan Spruce Mills	250.00	56.50	27.00	3.75	58.50	91.95
3. Kincaid & King Const. Co.	408.25	69.59	27.00	5.75	6.80	143.35
4. Heine Berger	1,959.22	424.49				507.56
5. Irene Arnold	10,344.81	1,784.07				392.58
6. William & Lillian Stolt	140.18	17.78		6.50	26.00	47.39
7. Kenneth W. Luse	2,375.05	298.40		6.00	26.00	551.02
Henry F. Wolff, Inc.	566.11	71.13		3.75	26.00	191.17
8. D. H. Cuddy, Trustee	4,131.00	677.87				871.33
9. Henry W. Cuffel	1,240.00					
10. R. H. and Marie Vore	290.00	34.80	22.60			43.50
11. Victor Gothberg	2,005.24	225.58				484.62
12. City of Anchorage	257.12	29.89	18.20			25.00
13. R. T. Schultz & J. R. Peck	939.37	128.92	27.00			250.00
14. United States	18,335.57					
15. United States	710.87					

2. That the above set forth claims and amounts be paid from the sum of \$35,000.00 derived from the sale of the real property involved in this action, insofar as possible.

Done in Open Court at Anchorage, Alaska, this 4th day of September, 1953.

/s/ GEORGE W. FOLTA,
Judge of the District Court.

[Endorsed]: Filed and entered September 4, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL
(Victor F. Gothberg)

Notice is hereby given that Victor F. Gothberg, an individual doing business as Gothberg Construction Company, one of the cross-complainants in the above-entitled matter, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain decree entered in the above-entitled matter on the 4th day of September, 1953.

That such decree was the final judgment in the above-entitled matter and that such decree purported to establish priorities of payment between mortgages and certain liens all as will more fully appear from such decree.

Dated at Anchorage, Third Judicial Division,
Territory of Alaska, this 2nd day of October, 1953.

DAVIS, RENFREW &
HUGHES,

Attorneys for Cross-Complainant Victor F. Goth-
berg.

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed October 2, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL
(Sullens & Hoss)

Comes now one of the above-named defendants,
Sullens & Hoss, Inc., a Corporation, and files this,
its Notice of Appeal, from a final Judgment ren-
dered in the District Court for the District of
Alaska, Third Division, on the 4th day of Septem-
ber, 1953, said appeal to be taken from this Court
to the United States Court of Appeals, Ninth Cir-
cuit, San Francisco, California.

Dated at Anchorage, Alaska, this 5th day of Oc-
tober, 1953.

BELL & SANDERS,

By /s/ BAILEY E. BELL,

Attorneys for Sullens & Hoss,
Inc., a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed October 5, 1953.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
AND DOCKET RECORD ON APPEAL

Davis, Renfrew & Hughes, attorneys for appellant Victor F. Gothberg, having made application for additional time in which to docket and file record on appeal and it appearing that the Court intends to be absent from Anchorage, Alaska, on November 9th and 10th and November 11th, which is a holiday, and it further appearing that good cause exists for extending time to file and docket record on appeal in this matter and that this Court has jurisdiction to grant the extension herein named and the Court being fully advised in the premises,

Now, Therefore, it is hereby ordered, adjudged and decreed that Victor F. Gothberg, appellant, may have to and including the 26th day of November, 1953, to file and docket record on appeal in the above-entitled matter.

Dated at Anchorage, Alaska, this 7th day of November, 1953.

/s/ J. L. McCARREY, JR.,
District Judge.

[Endorsed]: Filed and entered November 7, 1953.

[Title of District Court and Cause.]

ORDER FURTHER EXTENDING TIME TO
FILE AND DOCKET RECORD ON AP-
PEAL

Davis, Renfrew & Hughes, attorneys for appellant Victor F. Gothberg, and Bailey E. Bell, attorney for appellants Sullens & Hoss, Inc., having made application for an additional extension of time in which to docket and file record on appeal in the above-entitled matter, and it appearing to the court that notice of appeal was filed on behalf of Victor F. Gothberg on the 2nd day of October, 1953, and by Sullens & Hoss on October 5th, 1953, and it further appearing that such parties heretofore and on or about the 12th day of November, 1953, designated the entire record as the record on appeal and directed the clerk of this court to forward such record to the court of appeals at San Francisco, and it further appearing that such record has not been forwarded by the clerk to San Francisco, and is now in the hands of the District Attorney at Anchorage, Alaska, and it further appearing that ninety days have not elapsed since the filing of notice of appeal and that this court has authority to extend the time for docketing the appeal as provided by the Federal Rules of Civil Procedure, and it appearing that the court on the 7th day of November, 1953, extended the time for filing and docketing the record on appeal in this matter to the 26th day of November, 1953, and the

court being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that Victor F. Gothberg and Sullens & Hoss, Inc., two of the above-named appellants, may have an additional time to and including the 10th day of December, 1953, to file and docket the appeal in the above-entitled matter.

Dated at Anchorage, Alaska, this 25th day of November, 1953.

/s/ J. L. McCARREY, JR.,
District Judge.

[Endorsed]: Filed and entered November 25, 1953.

In the District Court for the District of Alaska,
Third Division

(Consolidated)—No. A-7261, No. A-7063 and
Nos. A-7131, A-6132

IRENE ARNOLD,

Plaintiff,

vs.

ALICE ROBERTS KELSEY and R. W. KELSEY, Husband and Wife; HEINIE BERGER; ALASKA ART TILE AND BUILDING SUPPLY; KETCHIKAN SPRUCE MILLS; KINCAID AND KING CONSTRUCTION

COMPANY, INC.; KEN LUSE & COMPANY; WILLIAM STOLT and LILIAN STOLT, d/b/a BILL'S ELECTRIC SUPPLY AND SERVICE SHOP; D. H. CUDDY, Trustee for PAT RYAN, ERMA SCHULER, V. W. GARRISON and ALASKAN PLUMBING AND HEATING CO., INC.; HENRY W. CUFFEL, d/b/a NORTHERN NEON SIGN CO.; SULLENS & HOSS, INC.; FRED GERKEN and BERNARD GOLLOMP, HUNT & MOTTET CO.; J. R. PECK and R. T. SHULTZ and VICTOR GOTHBERG, d/b/a GOTHBERG CONSTRUCTION COMPANY, and HENRY F. WOLFF, INC.,

Defendants.

KINCAID & KING CONSTRUCTION COMPANY, INC., an Alaskan Corporation,

Plaintiff,

vs.

ALICE ROBERTS KELSEY and ROYAL W. KELSEY, et al.,

and

UNITED STATES OF AMERICA,

Defendants.

TRANSCRIPT OF PROCEEDINGS

June 15, 1953—1:30 P.M.

Before: The Honorable George W. Folta,
United States District Judge.

Appearances:

J. L. McCARREY, JR., and
MRS. JANET WILSON,

Attorneys for the Plaintiff Irene Arnold
and Defendant Kincaid and King Con-
struction Company, Inc., in Cause No.
A-7261; for Plaintiff Kincaid and King
Construction Company, Inc., in Cause
No. A-7063; for Defendant Ken Luse &
Company and Defendant Henry F.
Wolff, Inc.

JOHN C. DUNN, of
CUDDY AND DUNN,

Attorney for Defendants Heinie Berger;
Ketchikan Spruce Mills; William Stolt
and Lilian Stolt, d/b/a Bill's Electric
and Service Shop; D. H. Cuddy, Trustee
for Pat Ryan, Erma Schuler, V. W.
Garrison and Alaskan Plumbing and
Heating Co., Inc.

WENDELL P. KAY, of
KAY, ROBISON & MOODY,

Attorney for Defendants Henry W. Cuffel,
d/b/a Northern Neon Sign Co.; William
Olday; Fred Gerken and Bernard Gol-
lomp, Hunt & Mottet Co.

BAILEY E. BELL, of
BELL & SANDERS,

Attorney for Defendants Sullens and Hoss,
Inc.

EDWARD V. DAVIS, of
DAVIS, RENFREW & HUGHES,

Attorney for Defendants J. R. Peck, R. T.
Shultz and Victor Gothberg, d/b/a Goth-
berg Construction Company.

EVANDER C. SMITH,

Attorney for Defendant J. C. Floor Cov-
ering.

ARTHUR D. TALBOT,

Asst. U. S. Attorney, Attorney for Defend-
ant United States of America.

The Court: I am unable to determine from the file here just the precise nature of the stage of this case, what is before the Court.

Mr. McCarrey: Your Honor, in this case the record will show that the original case of Irene Arnold vs. Kelsey, et al., was filed on the 15th day of October, 1951, to foreclose a mortgage which had been issued on the 25th day of January—correction, 16th day of January, 1951. Thereafter there were numerous lien claimants who came in and joined in this case and while I did not have an opportunity to check the file I think counsel will admit all of those actions, by order of the Court, both in written form as well as a minute order, were all consolidated. Now, on the 25th day of January, 1952, the

defendants, Alice and this other Kelsey, her husband, were adjudicated bankrupt. Now, further in the case, for and on behalf of Mrs. Arnold and others that the mortgagees and the various lien claimants have the right to proceed against the property itself or against the writs predicated upon the premise precedent, that they were at least four months and prior to the adjudication of bankruptcy and it is our understanding of the facts in this case that that is the case.

Now, this is to be determined, as we understand it, aside from the bankruptcy proceedings in its entirety and the purpose of this notice of motion and of the motion itself is to at this time have the parties accept the statement of facts heretofore prepared [4*] by our office unless there are objections thereto which the Court will consider and to determine at this time the priority of liens.

The Court: I overlooked the notice of the motion itself. There isn't any motion of hearing in the file.

Mr. McCarrey: Notice of the motion.

The Court: There is a notice of it?

Mr. McCarrey: Yes.

The Court: Are all the defendants represented here?

Mr. McCarrey: I think they are, your Honor, as far as I know.

Mr. Davis: Kelsey is in default.

Mr. McCarrey: Excepting for the Kelseys themselves.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Have you been served with a copy of the objections to the statement of fact?

Mr. McCarrey: Just to one, just now, your Honor.

The Court: Perhaps you better glance over it and——

Mr. McCarrey: (Did so.) In that respect, your Honor, nothing is set forth that that judgment was ever filed in the Commissioner's Office. Mr. Bell, can you tell us when it was filed? We have never been able to find it ourselves.

The Court: What judgment do you refer to?

Mr. McCarrey: The judgment he refers to is Sullens & Hoss.

Mr. Bell: It wasn't filed in the Commissioner's Office. It was a better lien in this district court. There is no reason [5] why it would be filed in the Commissioner's Court here in the Third District. If we wanted to change a lien in a special district somewhere outside of the Third, of course, we could take a certified copy of it and file it and create a lien but the statutes specifically provide that it is a lien when filed—when rendered and filed in the Clerk's Office and that's where it was filed. The Section of the statutes 55-9-61 of Alaska Compiled Laws provides that the judgment is a lien—a judgment in the District Court is a lien.

Mr. McCarrey: I wish to correct myself. I meant the records of his office rather than the Commissioner's Office. Now, in that respect, your Honor, the plaintiff, Irene Arnold, takes exception to that proceeding assuming that and we don't admit that

it is the case, for argument purposes that there is a controversy of facts, for this reason, that the lien which was heretofore filed by Mr. Kelsey by Sullens & Hoss was paid for in full. However, in the complaint you will find out that Sullens & Hoss, through their Attorney, Mr. Bell, make a statement that that lien was applied against the judgment and not the lien. We have proof that that is not the case. I don't know what your Honor has in mind by trying that particular issue.

The Court: Am I correct in assuming that the original objections to your statement of facts are the objections just filed?

Mr. McCarrey: Is that correct? [6]

Mr. Dunn: I made two notes and I think we can straighten them out amongst ourselves and I don't know whether I am right or not but I am at variance with the fact as stated. My notes show that under K, the claim of Victor F. Gothberg, the last date in the first paragraph, speaking of these materials, the last of them were furnished on or about the 15th day of September. According to my notes it was the 15th of October and the other is under L, dealing with the United States, the first page of paragraph II, I have that date as the 17th of September instead of the 2d.

Mr. McCarrey: Will you help us on that, Mr. Davis?

Mr. Davis: I can't answer as to a specific date on it.

Mr. Bell: According to the lien attached to the complaint, it would show the date.

Mr. McCarrey: That's only half of it. I call Mr. Dunn's attention to the lien attached to the complaint. It says the 15th day of September, 1951.

Mr. Dunn: I don't know but what those facts are correct. I wanted you to check them because my notes were contrary, just a suggestion.

Mr. McCarrey: According to the lien that is the way it stands. Do you have anything else?

Mr. Dunn: No.

Mr. Davis: What was the second one you mentioned?

Mr. Dunn: The claim of the United States, first date of paragraph II, under Section L, the 17th instead of the 2d. [7]

Mr. McCarrey: Your Honor, based upon the answer just served on us before the hearing Mr. Talbot has pointed out that is the 16th day of July, 1952. I wonder if that would clarify it, Mr. Dunn?

Mr. Davis: 16th is the same day. He is talking about the 17th of September rather than the 2nd of September.

Mr. Dunn: Second paragraph.

Mr. McCarrey: I also call Mr. Dunn's attention then to paragraph II of the answer which provides that it was on the 2d day of September.

Mr. Talbot: I believe it was the 2d day of September.

Mr. Dunn: If Miss Wilson is certain of those dates I make no objection to them. You'll recall that you and I both did quite a bit of work in checking this property at the time of the sale and I took

the information from my notes. Now your check was undoubtedly subsequent to mine.

Miss Wilson: The dates, as I have them, were checked out with the United States of America, Bureau of Internal Revenue, and the records, according to the United States Commissioner's records.

Mr. McCarrey: That should answer it, if that is the case.

Mr. Dunn: I'm making no formal objection.

Mr. Talbot: If your Honor please, the notice of motion which was served upon the United States Attorney, as this is a [8] form unfamiliar to me I am not clear whether this is a proposed stipulation or a pretrial conference or perhaps a motion for summary judgment. In any event I haven't had an opportunity to be advised by the Bureau of Internal Revenue exactly what position they desire to take. I have checked this information so far as I am able to check it and I find that what Mr. McCarrey says as to the Government's dates and the amounts of the liens is correct, but I'm really at a loss to know the nature of the proceedings today, your Honor.

The Court: I don't think we need concern ourselves so much with as you might say the technical aspects of it. I would treat it as a proposed stipulation of fact and the only question is whether the counsel representing the various parties are in agreement or are willing to so stipulate. Now, do you have any objections to this—to a stipulation of that kind?

Mr. Talbot: Well, your Honor, I haven't had a chance to check all this information but with all these attorneys concerned and everyone agreeing I will so stipulate that the facts, as far as they are shown, are correct.

The Court: Well, am I to understand that the only objections are the objections of Sullens & Hoss?

Mr. Bell: I am urging my objections.

The Court: Now, are these objections—you look them over—such as would require a hearing or do you wish to be heard on it or do you wish to submit the matter to the Court [9] without—

Mr. McCarrey: In that respect, your Honor, we would like to be heard by way of testimony as to whether or not the payment on the lien was accepted by Sullens & Hoss to prove that it was taken by way of payment upon the lien and not by way of payment upon the judgment. Now, I don't know how much time Mr. Bell would want.

Mr. Bell: We have no objection to anything now. The record will clarify itself.

The Court: You are willing to rest on your objections as you set them forth here?

Mr. Bell: Yes, sir.

The Court: Well, the procedure would require that you proceed as though he had put in his case.

Mr. McCarrey: May I have just one moment to check on this, your Honor?

The Court: Yes.

Mr. McCarrey: Your Honor and Mr. Bell, calling attention to paragraph 2—

The Court: That's paragraph 2 of what?

Mr. McCarrey: Of the statement of facts—that is on page 10 of the statement of facts. Mr. Bell, I would like to call your attention to paragraph 2 on page 10 of the statement of facts.

Mr. Bell: Paragraph 2 on page 10—all [10] right.

Mr. McCarrey: Now, it is my understanding, based upon your last statement, that you would be willing to admit that this has never been recorded in the records office, is that correct?

Mr. Bell: I admit that it is a judgment rendered in open court and the decree signed and filed in the District Court and was duly entered and the judgment roll made up there as the records show in the office of the District Court and that there was no filing of anything before the United States Commissioner or ex-officio records.

Mr. McCarrey: That being the case then you don't except to that fact?

Mr. Bell: You say that it does not constitute a lien? Well, that's what I except to. That is a conclusion of law. I say that it did. When it was filed by the Clerk of the District Court, like the statutes said, it becomes a lien on everything.

Mr. Dunn: If your Honor please, my proposed suggestion is that we strike so much of the statement that says, "does not constitute a lien," and we can stipulate that the judgment was docketed in the District Court but that it was neither docketed nor recorded in the Commissioner's Court and having so amended this, submit the question to the

Court to decide whether or not such a docketing in the District Court or in the Commissioner's Court constitutes a lien.

The Court: I think that has probably been the practice under the stipulation, that is, improper to include in a [11] stipulation a matter of law and therefore we may just eliminate that.

Mr. McCarrey: That is satisfactory.

Mr. Bell: If you will strike that part that will settle it. Then it will be a question for you to determine whether it constitutes a lien or not.

Mr. McCarrey: I was going to come to that next but I believe Mr. Bell summed it up.

The Court: Very well. That will be stricken then.

Mr. McCarrey: Now, your Honor, we have the next question to determine, whether or not this sum of \$376.53 was ever paid upon the older debt or upon a lien they had at that time and at this time we are prepared to go ahead and present testimony on that point. I imagine it won't take more than one moment.

The Court: Very well. You may do that.

Mr. McCarrey: At this time I call Mrs. Irene Arnold.

IRENE ARNOLD

called as a witness in her own behalf as plaintiff, and, being first duly sworn, testified as follows on:

Direct Examination

By Mr. McCarrey:

Q. Will you state your name, please?

A. Irene Arnold.

Q. And are you the plaintiff in this cause of action or Irene [12] Arnold vs. Alice Roberts Kelsey and R. W. Kelsey, A-7261? A. Yes.

Q. Now, calling your attention to the fall of 1951, did you have an occasion to talk to Mr. Kelsey about this matter concerning the payment of a lien with Sullens & Hoss?

Mr. Bell: I object to that she talked to Mr. Kelsey unless the Sullens & Hoss were present or their agent. Why the conversation would not be——

Mr. McCarrey: Your Honor, she has not testified to the conversation. If counsel will give me a chance. Did you have occasion to talk to him?

A. Yes, sir.

Q. Now, at that time, did you see a piece of paper from the office of Sullens & Hoss?

A. No. I saw a piece of paper from Mr. Bell's office, signed by Mr. Bell.

Q. What did that piece of paper state?

Mr. Bell: I object to that. The piece of paper itself would be the best evidence.

The Witness: It was typewritten.

Mr. Bell: I object to that.

(Testimony of Irene Arnold.)

The Court: The objection will have to be sustained if you call for the contents of the paper unless you can show that it has been lost or something or not available.

The Witness: Mr. Kelsey kept it so I [13] didn't—

Mr. Bell: I object to her making a statement. You have already ruled.

Mr. McCarrey: Mr. Bell, do you have such a piece of paper?

Mr. Bell: I was just trying to see if I have anything.

Mr. McCarrey: If so, we make demand upon you to produce it.

The Court: Well, you may ask the witness if she knows.

Mr. Bell: I guess I have a copy of it right here, maybe, this is probably it, the only one I know about.

Q. (By Mr. McCarrey): This is the piece of paper to which you were referring?

A. No, sir.

Q. What did that refer to, if you recall?

A. Which? This?

Q. No, the one that you were referring to.

A. No, it was simply a receipt for a certain sum of money, this \$307 and some odd dollars and Mr. Kelsey wanted me to understand that that had been paid.

Mr. Bell: I object to her testifying to hearsay.

(Testimony of Irene Arnold.)

The Court: I think the objection will have to be sustained.

Mr. McCarrey: Your Honor, in this case we would like to submit this as evidence showing what the intent was and why the defendant was by the office of Mr. Bell. [14]

Mr. Bell: No objection to the letter being introduced. It is a copy of a letter.

The Court: It may be admitted.

(Thereupon, copy of letter, dated September 7, 1951, was received in evidence and marked Plaintiff's Exhibit 1.)

Q. (By Mr. McCarrey): Mrs. Arnold, did you have an occasion thereafter to go up to the office of Sullens & Hoss? A. Yes.

Q. And for what purpose?

A. Well, I had been getting quite a lot of materials from them and asking questions for certain things I needed for this building and so forth, so I, on one occasion, I purposely just wanted to find out so I said to the bookkeeper—

Q. Find out what? What do you mean?

A. I wanted to find out whether or not there was any indebtedness there against the Kelsey Estate.

Q. Yes. A. So I asked him if they—

Mr. Bell: I object to her talking unless—this is a corporation—unless she was talking to someone with authority at the corporation. She might have been talking to the porter.

(Testimony of Irene Arnold.)

Q. (By Mr. McCarrey): Who were you talking to? [15]

A. He was a bookkeeper. I can't recall his name right now, quite an odd name, a man with a little mustache.

Q. What did you inquire of him at that time?

Mr. Bell: I object to that for the reason that would not be binding. The bookkeeper telling her something—this is a corporation.

The Court: I think you have to show something as to the extent of the operations of Sullens & Hoss and whether there were any considerable number of officers in the corporation above the bookkeeper. If just a small outfit presumably the bookkeeper would have knowledge of these matters, otherwise maybe he wouldn't.

Q. (By Mr. McCarrey): Mrs. Arnold, are you familiar with the corporation known as Sullens & Hoss Corporation? A. Am I familiar?

Q. Yes. A. Yes, I know them quite well.

Q. Who are the officers, if you know?

A. Well——

The Court: Who were they at the time?

Q. (By Mr. McCarrey): Yes, who were they at the time?

A. Mr.—I think it was Mr. Hoss. One of them separated from the service, from the corporation, so I think it is Mr. Hoss himself.

Q. And do you know anybody else that was affiliated at that time [16] with the corporation?

A. I don't know whether Mr. Sullens was at that

(Testimony of Irene Arnold.)

time. He separated at a time I didn't know and began to inquire and they told me he was no longer with them.

Q. Who was that? A. Mr. Sullens.

Q. Did you know any of the other officers at that time of that corporation?

A. Yes, I knew this man very well and quite an odd name. I can't recall it.

The Court: What was his officer capacity?

A. He was a bookkeeper.

The Court: Just the two of them, just two there that managed the office?

A. Oh, no; there were a regular office force. I only knew them by sight, the office force. I did know this man. I can't recall his name at this time.

Q. (By Mr. McCarrey): How long had he been working for them? A. A long time.

Q. Do you know what his capacity was?

A. He was—in addition to being more or less a bookkeeper he seemed to be in charge because he was the one that always okayed things and approved.

Q. Did you have occasion to go more than [17] once?

A. Oh, yes; I was in various times; know me very well.

Q. Was he acting in that capacity on these various occasions? A. Yes.

Q. As such do you know whether or not he was familiar with the operation of the Sullens & Hoss corporation? A. Very much so.

(Testimony of Irene Arnold.)

Mr. Bell: Objection.

The Court: The objection will be overruled.

Q. (By Mr. McCarrey): Will you then state, Mrs. Arnold, what he told you about the Kelsey Estate?

A. Well, when I went in one time he said, you are still working with that Kelsey thing. I said, yes, I have to, and I said, did you get yours, and he said, yes, thank goodness we did, and I said, something around \$300 some odd dollars, and he said, yes. So that was all he said in that connection.

Mr. McCarrey: That is all.

Cross-Examination

By Mr. Bell:

Q. You did know, Mrs. Arnold, that they were selling lumber occasionally from the Sullens & Hoss yards to this man and his wife out there? You knew they were selling lumber occasionally to them, did you not? [18]

A. No, I had no reason to know.

Q. How come you to go in there and inquire if they had been paid then?

A. Well, because I knew I had seen this piece of paper with your signature, \$300 and some odd dollars being paid in full. I saw that. He brought it by and showed it to me.

Mr. Bell: I move to strike that as not responsive to the question—the last part of the answer is not responsive to the question I asked her.

(Testimony of Irene Arnold.)

The Court: It may be stricken.

Q. What they were selling—now, you do know that Sullens & Hoss were selling lumber to the Kelseys, don't you?

A. No, I didn't know it. I had always dealt with them in various things.

Mr. Bell: That's all.

(Thereupon, the witness was excused and retired from the witness stand.)

Mr. McCarrey: Your Honor, that is all we have to present at this time on that point. Now I don't know what the pleasure of the Court would be with reference to the determination of the priority of liens. I ask counsel at this time if they are prepared to stipulate to these statements of fact as—

The Court: Does your proposed stipulation cover priority of these claims? [19]

Mr. McCarrey: No, it does not, your Honor.

The Court: In other words, that is something yet to be determined, is it?

Mr. McCarrey: Yes, your Honor, that is correct.

The Court: Are the parties agreed on the facts then it will be necessary for the Court to have in order to determine the priority?

Mr. Davis: I didn't understand what you said last.

The Court: I said, are the parties agreed on the facts from which priority can be determined?

Mr. Davis: I'm satisfied.

The Court: The facts as set forth in this proposed stipulation?

Mr. Davis: Yes.

Mr. Dunn: Your Honor, I am willing to stipulate that these are the facts but I would like to ask counsel present to go even farther and stipulate that these facts may be submitted without argument of the law concerning them and that they and that we agree now that the Court may decide the priority of these liens from the facts stipulated without any necessity for further hearing or argument at all.

Mr. McCarrey: That is satisfactory.

The Court: Well, then the only other question is that raised by the objections of Sullens & Hoss.

Mr. McCarrey: That is correct, your [20] Honor.

The Court: You wish to be heard?

Mr. Bell: I will state to the Court the truth about that confusion this lady has. I am confident she didn't see any statement of that kind from me but I did give him a statement that she probably did see and I don't have a copy. I tried to dig it up and I don't know where it is but I did give him a real estate mortgage to be executed. I prepared a note and a real estate mortgage and a stipulation whereby that by him paying this amount of money, \$300 and some odd dollars, that we would release the lien in full and take the mortgage back for the amount of the judgment, plus interest and attorney's fees as provided in the judgment. The attorney's fees belong to Mr. McCarrey who was the attorney who took the judgment in the case and I

did put that in a stipulation for him with a mortgage that he took out to have his wife to sign it and left the money there with me of this \$300 and some odd dollars and he never came back with it. I drove out to the house—Mr. A. E. Hoss and I drove around after him trying to get the mortgage signed to take the place of the old judgment but he wouldn't. He kept stalling me and saying that his wife wouldn't sign it; that he had signed it but she wouldn't sign it; that then that's the last I ever heard from him and then when we couldn't get him to give us the mortgage like he promised to and like his wife promised to give us, why, then, we applied the money on the oldest account, just like we had a right to do, because he didn't go through with his agreement and if he had gone through with the [21] agreement the amount of money he had paid would have been accepted and the lien would have been released. But he didn't go through with it and therefore we didn't release the lien and applied his money on the mortgage. You can see by the cross-complaints and everything that has been set up in all of these cases we gave them a contract with that amount of money on the judgment all the way through, over a year ago, because the money that he turned over to me at the time was applied to the old judgment which was the oldest and the most prior lien. It was a prior lien to all of these other liens because it was a judgment of record in the Clerk's Office. Now, that's the situation as it stands. The lien is in full force and effect in this suit, if this suit is in full force and effect, because they did not go through with the

agreement and still have the real estate mortgage and the note and papers yet; so far as I know, they never did sign them and never did return them to me in compliance with the agreement.

Now, Mr. Hoss is in a cancer hospital in Chicago and I didn't want to delay this on account of that but if they doubt that statement I will get Mr. Hoss here as soon as he gets back out of the hospital and show you that is exactly what took place.

The Court: Do you accept that statement of counsel?

Mr. McCarrey: We do not, your Honor, and furthermore, if Mr. Bell wants that as part of the record, we ask that he be sworn if he is testifying.

Mr. Bell: I am an officer of the Court. I don't have [22] to be sworn. If the Court wishes me to——

The Court: The counsel has a right to insist on that. He has refused to do so, so I think you will have to repeat that statement on the stand.

Mr. Davis: I might ask one question. Maybe clear it up. Is it true there was \$300 and some odd dollars paid to you?

Mr. Bell: It was.

Mr. Davis: And apparently then you applied the amount that was paid to the judgment rather than to the lien, is that correct?

Mr. Bell: That is right. Now, do you want me sworn?

The Court: That is up to counsel.

Mr. McCarrey: Your Honor, in that respect, that is for the purpose of the record, he be sworn and let

the testimony stand. The court reporter already has it.

The Court: You mean we would consider his testimony has been given under oath? If you have no objection——

Mr. Bell: It is all right with me.

The Court: You may take the oath then.

(Thereupon, Bailey E. Bell, Sr., took the oath and was sworn in, his previous statement being considered as if having been given under oath.)

Mr. Bell: Now, your Honor, as to no argument, I don't think that Mr. Dunn really meant that exactly as he stated. I don't think so because there is certainly going to be some argument [23] as to priority. There is not enough money to pay everybody, the way I understand it, isn't that right, Mac?

Mr. McCarrey: That is true.

Mr. Bell: And there is quite an argument as to priority.

The Court: I wouldn't want to cut anybody out of an argument but if some of the counsel or parties wish to argue the matter, of course, they will be given an opportunity but it will have to be at some other time. What do you feel about that suggestion?

Mr. Talbot: If your Honor please, I am unable to stipulate to any priority of liens and these matters are ordinarily handled for the government by counsel for the Internal Revenue and I would therefore request 30 days within which the government

may file a brief setting forth the priority of liens as we wish the Court to find.

Mr. McCarrey: Your Honor, I think that is unreasonable—30 days. We have been working on this case now since 1951 and I don't think the government should be granted any more leeway than the taxpayers and therefore I urge the Court not to grant 30 days. That is too much time.

The Court: Who would do the work on behalf of the government?

Mr. Talbot: Mr. Thomas Winter or someone in his office.

The Court: Where is he? [24]

Mr. Talbot: In Seattle, your Honor, and I haven't had a chance to communicate with him in respect to this case. The notice of motion came on or was served on us on the 9th of June and I thought it better to wait and see what it is all about before I wrote him.

The Court: Do you know whether he would want the job of writing the brief or do you know if he would want you to assume it?

Mr. Talbot: No, he would want to write it and I would want him to write it.

The Court: I think two weeks ought to be enough. He ought to be an expert in that line.

Mr. Talbot: Very well, your Honor, I will get in touch with him immediately.

The Court: Does anyone else want to file a brief in this case or make an oral argument at some other time fixed by the Court?

Mr. Davis: I would suggest that before any one

decides to file a brief that you go over the file and give us some idea on what you would like to have help on. I think the statements set forth here are pretty good, would not be too difficult to apply the matter of priorities to any of it except the United States' claim and the claim Mr. Bell has mentioned here.

The Court: Just inform me as to the nature of the United States' claim. What is it for? [25]

Mr. Talbot: Your Honor, we have a claim for income taxes and also for withholding taxes and the total, with penalty and interest, is probably just around \$22,000, and it is our—I'm sure it will be our position that the payment of taxes is entitled to a very high priority in bankruptcy.

The Court: Well, you may have two weeks or two weeks will be allowed the United States to file a brief and any other party may file a brief; otherwise, the Court will take the record as it is and if after examination of the record the Court concludes that additional briefs should be filed, it will make an order to that effect.

Mr. Bell: Your Honor, would you make this order that any person in the case who cares to file a brief may have one week to file it and serve it and opposing counsel has five days to answer it and thataway we would get our briefs all in before the government's brief went in and you would have the advantage of them being available.

The Court: That will be the order of Court.

Mr. Dunn: If your Honor please, if we are not going to submit these things with arguments, then

couldn't some provision be made for counsel, other than the counsel of the United States, to answer the brief of the United States when it is submitted? It will come in last.

The Court: The order perhaps should be enlarged to include the right to answer or reply to the brief on behalf of the [26] government, upon making application therefor to the Court.

Mr. McCarrey: Well, a minute order will suffice in that respect, your Honor.

The Court: Yes. That disposes of that stage of this particular case.

United States of America,
Territory of Alaska—ss.

I, Bernice E. Phillips, Official Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcript of the proceedings in the above-entitled matter taken by me in stenograph in open court at Anchorage, Alaska, on June 15, 1953, and thereafter transcribed by me.

/s/ BERNICE E. PHILLIPS. [27]

June 24, 1953

The Court: Do counsel have a copy of the order entered by the Court?

Mr. McCarrey: I do not, your Honor, but I was advised by the clerk and I do have the questions, I believe, and I think I can submit them to your Honor.

The Court: Well, I don't want them because right here in the minute order——

(The Deputy Clerk left to get the court file.)

The Court: I intended that copies of this minute order would be supplied to counsel but apparently there has been a misunderstanding so I am having the original order or draft of the order obtained from the Clerk's office. I just want to read the text of the minute order so that counsel may have their memories refreshed.

“It is ordered that to determine relative priorities it will be necessary, and therefore it is ordered, that the case be reopened for the production, by plaintiff, of a copy of a mortgage of September 17, 1949, and evidence bearing on the following questions?

“1. Was the first mortgage cancelled or released on the records in the Commissioner's Office? If so, when?

“2. Did plaintiff know at the time the second mortgage was executed, of any liens against [30] the Kelsey property?

“3. Was any attempt made to determine whether there had been any such liens?

“4. Was it intended that the first mortgage should be released when the second one was executed? Did you have any conversation with Kelseys about this?”

You may proceed, Mr. McCarrey.

Mr. McCarrey: At this time I would like to call Mrs. Arnold. She was sworn in; would you like to have her resworn?

The Court: No.

IRENE ARNOLD

recalled as a witness on her own behalf and having been previously sworn, testified as follows on

Direct Examination

By Mr. McCarrey:

Q. You are the same Mrs. Arnold that testified in this hearing the other day? A. Yes.

Q. Mrs. Arnold, I hand you what is purported to be a real mortgage, dated September 17, 1949, and ask you whether or not that is the morgage you executed, that is, made by you to Kelsey? [31]

A. Yes, it is.

Q. Now, has it ever been released?

A. I don't think so.

Q. In the Commissioner's Office? A. No.

Q. Mrs. Arnold, I hand you a chattel mortgage, dated the same date, and ask you whether or not that mortgage, as executed by Mr. Kelsey, for the money you loaned on it, so designates, and whether

(Testimony of Irene Arnold.)

or not in addition it represents an additional \$5,000.00 or is it the one and same \$5,000.00?

A. It is the same \$5,000.00.

Mr. McCarrey: Your Honor, we offer this in evidence, having submitted it to counsel first. You will find, your Honor, that this bears the recommendation of the Commissioner's Office which will speak for itself. While they are looking at the documents, I hand you what purports to be a promissory note and ask you whether that is the promissory note for which these two mortgages were given as security?

The Witness: Yes, sir.

Mr. McCarrey: I likewise offer this in evidence, your Honor.

The Court: What is the amount of that note?

Mr. McCarrey: Five thousand dollars, your Honor.

(Thereupon, the documents above referred to were entered in evidence as Plaintiff's Exhibits 1, 2, and 3.) [32]

Q. (By Mr. McCarrey): Mrs. Arnold, I would like to hand you at this time a real estate mortgage dated 22 December, 1950, and also a promissory note which is purported to have been executed at the same time and will you explain to the Court how that was—why that was executed?

A. Well, Mr. Kelsey said that Mr. Heinie Berger held a mortgage—

Mr. Bell: Object to the statement as not re-

(Testimony of Irene Arnold.)

sponsive to the question. He asked what the instrument was.

Q. Can you explain?

The Court: I think you asked what the circumstances were in making something of that kind. Well, as I have ruled so many times the objection that the answer is not responsive may be made only by the person conducting the examination, so in the absence of another objection on some other ground, the objection, of course, will have to be overruled.

Mr. Bell: I object on the ground it is incompetent, irrelevant and immaterial and it is not responsive in any way.

The Court: I think it is probably hearsay because she commenced to say what someone else said about it.

Q. (By Mr. McCarrey): All right, Mrs. Arnold, on or about the 22nd day of December, 1950, did you have occasion to loan some more money to Mr. Kelsey?

Mr. Bell: Object to her having any occasion. That is not a proper question at all. [33]

Q. Were you asked to loan some money to Mr. Kelsey? A. Yes, I was.

Q. And what amount was that?

A. \$8,000.00, so that he could pay off Heinie Berger, therefore, making me the first mortgagor.

Q. Now, were there any other sums that you loaned at the same time?

A. Yes, for another case Reed and Skimer, or something that was in progress then, which he lost

(Testimony of Irene Arnold.)

and I took that up so there would be no other indebtedness over mine.

Q. Now, did Mr. Kelsey pay you back the \$5,000.00?

The Court: I didn't quite understand that last answer.

A. There was a case against Mr. Kelsey in court at that time, I think the name was Reed and Skinner, at any rate he lost the case and so there would be no indebtedness preceding mine, I paid that off, which was \$3,609.51.

Mr. Bell: \$3,609.51?

Mr. McCarrey: Yes.

Q. (By Mr. McCarrey): Now Mrs. Arnold, had Mr. Kelsey paid you back this real mortgage and chattel mortgage that he executed to you in September, 1949?

A. No, he paid a small amount on the interest but nothing on the principal.

Q. Now, is that sum reflected in that second mortgage there? [34]

A. Yes, the entire sum is consolidated here.

Q. Mrs. Arnold, I hand you two checks and ask you whether or not you know what they represent?

A. Yes, I do. It was the sums that I just referred to, the \$8,000.00 and the \$3,609.51.

Mr. McCarrey: Now, your Honor, should these go in as one exhibit or individually?

The Court: Well, if there is going to be any examination on them separately, they ought to be separately marked.

(Testimony of Irene Arnold.)

Mr. McCarrey: In that event I would like the mortgage be marked Exhibit No. 4, promissory note No. 5, the check for \$8,000.00 No. 6 and the check for \$3,609.51 No. 7.

The Court: They may be marked accordingly.

(Thereupon, the documents above referred were entered in evidence as Plaintiff's Exhibits 4, 5, 6, and 7.)

Q. (By Mr. McCarrey): Mrs. Arnold, at the time the second mortgage was executed, which was on the 22nd of December, 1950, did you know there were other liens outstanding?

A. No, there wasn't supposed to have been because he was supposed to pay off, with the \$8,000.00, all the indebtedness to Mr. Berger.

Q. Did you go check the title to the property yourself in the Commissioner's office? [35]

A. Yes, the title of the property.

Q. Did you go check the books of the title?

A. No, no, he left those with the insurance company and they were the ones that did it and he paid them to do it.

Q. Did you make any attempt aside from that to determine whether or not there were liens against the property?

A. I verified what he said that there were these two liens and this \$8,000.00 was supposed to take care of that.

Q. Now, was it intended that the second mortgage was to take the place of the first mortgage?

(Testimony of Irene Arnold.)

A. Yes, absolutely.

Mr. McCarrey: Your Honor, as I recall that represents one of the questions that his Honor had in mind and in reference to this problem if I have overlooked anything would you please advise on that.

The Court: I think it does.

Mr. Bell: I would like to cross-examine, your Honor.

The Court: You may do so.

Cross-Examination

By Mr. Bell:

Q. Mrs. Arnold, how long had you known Alice Roberts Kelsey on the 17th day of September, [36] 1949? A. I would say probably six months.

Q. Was she a relative of yours? A. No.

Q. You had known Mr. Kelsey about how long at that time? A. Oh, about the same time.

Q. And where did they live at that time?

A. They were living in the Spenard Building that was in a very crude state of completion.

Q. Borrow on this particular property involved in the mortgage?

A. That is right, yes.

Q. And about what state of development or completion was the building in at that time?

A. Well, hardly livable for the family.

Q. And there was a store building in it also, wasn't there?

(Testimony of Irene Arnold.)

A. Store building was there, yes, and they were living in a 2-room apartment on the side, very crudely finished.

Q. Do you know who was building the building at that time? A. I understood he was.

Q. And do you know where he was buying the lumber to build it? A. No.

Q. Do you know who was doing the plumbing there? A. No.

Q. Did you inquire of him who was doing the plumbing?

A. Well, he led me to believe that he was doing it himself of necessity from lack of funds. [37]

Q. And you loaned him the money to buy more materials or to pay debts that had accumulated against it, did you?

A. That is what he was supposed to do with the money—was to pay for the material.

Q. And did you do the same thing with the second loan? You made another one later, didn't you?

A. Yes, sir.

Q. And that was made to make payments of obligations he owed against the building?

A. That is right.

Q. Now, I understand you to say that he promised you that he would pay this other small mortgage off, it was ahead of ours, out of this \$8,000.00 you loaned him. Did he promise to pay that?

A. That was the one of Mr. Berger's?

Q. Yes. A. Definitely.

(Testimony of Irene Arnold.)

Q. Did he ever pay it off, or do you know?

A. He paid one off but not the smaller one.

Q. He paid the mortgage off? A. Yes, sir.

Q. Do you know how much it was?

A. I think approximately \$7,000.00.

Q. And then there was another one, a smaller one on there, was there? [38] A. Yes, sir.

Q. Now, were you in the loan business, Mrs. Arnold, at that time? A. I was not, no.

Q. How come you to become acquainted with the Kelseys?

A. Well, it just came to my attention that he couldn't borrow from the bank and he needed it so badly and his family needed better living conditions and I looked out there and saw this and it seemed to me that the lots were paid for and everything was—\$5,000.00 would get him started—was just a case of sympathy of the family.

Q. Did you live near Mrs. Kelsey?

A. No, I did not.

Q. Now, you took a chattel mortgage also on the hardware store and equipment and everything, didn't you, including all furniture and fixtures in the place? Was that mortgage ever paid or anything paid on that?

A. Just a small amount on the interest.

Q. Wasn't anything paid on the principal of that?

A. Very small amount. They worked it out and that was the sum. It totaled \$16,609.51 balance due.

Q. Now, after that \$16,609.51 note and mortgage

(Testimony of Irene Arnold.)

was made, you received quite a number of payments, didn't you? A. Afterwards?

Q. Yes, after the \$16,609.51 note was made you received monthly [39] payments for a while, didn't you? A. No, sir.

Q. Did you receive any payments? A. No.

Q. And you are the trustee or you had charge of the building after they left out there, did you not?

A. Yes, sir.

Q. Now, did you get the rent on that building up until the time it was sold?

A. I didn't get the rent. I put the rent into the account of R. W. Kelsey in the bank. I opened an account to them.

Q. Well, now, are those rents in the account of R. W. Kelsey in some bank here? A. Yes, sir.

Q. What bank are they in?

A. The First National.

Q. Are they there in the name of R. W. Kelsey or in your name, as trustee in the bankruptcy matter?

A. R. W. and Alice Roberts Kelsey.

Q. And how much money is there in that account?

A. Well. I have \$5,000.00 of the rentals collected.

Q. About \$5,000.00? A. Yes, sir.

Q. And, now, you sold the property by agreement of all people. How much did you get for the property? [40] A. \$35,000.00.

Q. And is that in the same account?

(Testimony of Irene Arnold.)

A. Yes, sir.

Q. So then you have a little over \$40,000.00 in the account? A. Yes, sir.

Q. Was that all the rent you collected up to the time that the property was sold?

A. With the exception of the amount of the indebtedness of my own personal obligations. They were repaid to me of—Mr. McCarrey has a complete copy of all moneys spent.

Q. And how much was that approximately?

A. Well, I would say about \$16,000.00, \$17,000.00 or \$18,000.00. See I had the building all rewired for safety of fire which was over \$2,000.00 and they had no money so I had to use my own and pay it off and eventually the rent paid me back.

Q. So you took the \$18,000.00 to repay you, did you? A. Yes, sir.

Q. About \$18,000.00. Now, about what time was it that you took over this property out there? About what date? Just as nearly as you can get it?

A. Must have been in the fall of '52, '51 I guess.

Q. Fall of '51. Now, where did Kelsey and his wife go, do you know?

A. I took over the property immediately after they left but I was appointed trustee. It was about the fall of '52, '51. [41]

Q. They left here. There was a bankruptcy action filed by them and you were appointed trustee by consent of all the attorneys here, weren't you?

A. Yes, sir.

Q. Now. this \$5,000.00 that you are talking

(Testimony of Irene Arnold.)

about, did you collect all of that after you were appointed trustee or was some of that before you were pointed trustee?

A. No, I think all of that was collected afterwards. It was then about \$6,000.00, but I had to pay out some—I mean indebtedness—I wanted to settle with everybody, so finally had about \$5,000.00.

Q. Now, when did you—who was it you paid these liens off to? What particular liens did you pay off?

A. I didn't pay any liens off except Mr. Olday who was owed \$125.00 and he wouldn't excavate or go after the cesspool unless I paid Kelsey's old \$125.00 off and that was all the liens.

Q. What was the rest of the \$1,000.00 difference between the \$5,000.00 and the \$6,000.00 used for, as near as you can remember?

A. To thaw pipes and have an electrician working reasonable and fixed another apartment that he had finished and rented that. That helped to increase the rentals so it was all used. It is set forth—I thought all of you attorneys had a copy of [42] that.

Q. No, have you filed a report as Trustee in the bankruptcy case setting up those things? Have you caused a report to be filed in there?

A. Well, I haven't filed a report any more than I set forth from the day I went in and how all the moneys were spent and showing the income and the expenses.

(Testimony of Irene Arnold.)

Q. Where did you file that?

A. Mr. McCarrey, and I thought all the other attorneys had a copy of it. I made quite a few when they had meetings.

Q. I am just informed that you have never filed a report in the bankruptcy proceeding after any of these transactions, is that right?

Mr. McCarrey: That is right.

Q. Now, when you file your report you will include in that report all the things you told us about?

A. Yes, sir.

Q. Have you prepared that, Mr. McCarrey?

Mr. McCarrey: It isn't in final form.

Q. Who has possession of the building now?

A. I can't remember the name of the lady that bought it.

Q. Did you have any interest in it after it was sold, in any way? A. No.

Q. Did you make a loan on it, any more, after that? A. No. [43]

Q. You know what the income, the monthly income, was from the building the last month you held it?

A. It was \$1,400.00 and some odd dollars.

Q. \$1,400.00. Was it \$1,470.00 approximately?

A. Yes, sir.

Q. And had it been that for some time before it was sold, approximately that?

A. Well, it varied. It had gotten down to \$800.00 because people would move out of the apartments and were vacant for a time so it varied and

(Testimony of Irene Arnold.)

when some of them found out I was going to sell they were afraid they wouldn't get heat in the building because I had promised it to them if I kept it so they moved out, so the building was not bringing in very much. Actually when it started was three months before the sale was completed so it wasn't bringing in very much. I have forgotten her name that took it over.

Q. But it was refilled right away?

A. I don't know about that because I haven't talked with her. The building was not heated, we just had space heaters in there and not going to be adequate through the winter.

Q. You went out of the Territory of Alaska during the time that you had possession of the building?

A. Oh, yes.

Q. And who took care of it during the time you were gone? A. My daughter. [44]

Q. Your daughter?

A. She collected the rent and did the deposits.

Q. Is she here today? A. Yes, sir.

Q. And now, why didn't you have Mr. Kelsey sign that first real estate mortgage on this property? I noticed it is not signed by Mr. Kelsey at all, but is only signed by Alice?

A. Well, they said that her signature was more important because the land was in her name and not his.

Q. You noticed his name was not mentioned anywhere, is it, and the signature on there?

(Testimony of Irene Arnold.)

A. Well, that's what they said, it was her property, not his.

Q. I see, and you were well acquainted with them, of course, when you loaned them the money, weren't you?

A. No, I never was well acquainted with them.

Q. Well, you were acquainted with them enough, you said, that you felt sorry for them?

A. I did, I would anybody, but they said the lots were worth more than they were asking.

Q. And you did know that they lived there? It was their home?

A. Yes.

Q. And you didn't ask Mr. Kelsey to sign the mortgage or the note either one, that first loan?

A. Well, they said it was her property, not his, so her [45] signature was the important one.

Q. And that is what you thought and that is what you took?

A. That is what I thought, yes.

Q. Now, when the second mortgage was made, you had Mr. Kelsey's name included in the mortgage and had him execute it, did you not?

A. Well, he had, I understand, some of the obligations there and it was supposed that he was at that time interested in the building that was being built but the land was hers and that is all it really started with.

Q. Well, you felt that Mr. Kelsey, being the husband of Alice Roberts Kelsey, and being active and having charge of the building, that he should sign the note and mortgage, didn't you?

(Testimony of Irene Arnold.)

A. Yes, sir.

Q. And did you have him sign it now, is that right?

A. Yes, sir.

Q. Now, as I understand it, this second mortgage for \$16,609.51, that was recorded January 15, 1951—that this \$5,000.00 that was secured by the first real estate mortgage, signed by Mrs. Kelsey only, and the chattel mortgage was included in, and made a part of, this second mortgage of \$16,609.51?

A. Yes, sir.

Q. And you loaned them enough money in addition to the \$5,000.00 to bring it up to that [46] price?

A. Yes.

Q. Now, did you ever sell this chattel property out there?

A. Which chattel property?

Q. The one secured by the chattel mortgage?

A. No, I didn't.

Q. Did you file a chattel mortgage of record?

A. The \$5,000.00?

Q. Yes.

A. Yes, sir.

Q. Did you ever release it?

A. No, it wasn't released.

Q. And the hardware store—the stock in the hardware store was included in that mortgage, was it not?

A. Yes, sir.

Q. Did you ever sell that stock in the hardware store?

A. No, sir.

Q. You know what became of it?

A. The City Bank—he gave a chattel mortgage to the City Bank and they sold it and, I believe, it was \$2,500.00.

(Testimony of Irene Arnold.)

Q. Was that after your chattel mortgage was made or before? A. Afterwards, I think.

Q. And you didn't object to the bank taking the chattel mortgage and the property?

A. No, by that time I had seen the building progressing and I knew any mortgage was covered by just the building and the [47] lots.

Q. The building was progressing steadily from the time you made your first loan or even quite a long time before that, up to the time you made the second?

A. Yes, because he had quite a few men helping him in the meantime and his apartments were progressing and getting more income.

Q. Could you tell the Court about what date the building was started—the work started on the building?

A. It started before—he had the frame up there before I knew him.

Q. The building was going up before you ever met them? A. Yes.

Q. I see, and you had known them about six months when you made the first loan?

A. I would say that.

Q. Now, this promissory note of December 22, 1950, that is the only note that you have now that is not paid, isn't it?

A. December 22, 1950, yes.

Q. \$16,000.00? A. That is correct.

Q. And by keeping the second mortgage you considered the first mortgage paid and released?

(Testimony of Irene Arnold.)

A. That is right.

Mr. Dunn: May I ask Mrs. Arnold some questions? [48]

The Court: Yes.

Cross-Examination

By Mr. Dunn:

Q. Mrs. Arnold, I didn't understand—I didn't hear your answer to Mr. McCarrey's question concerning the efforts that were made by you to discover whether or not there were any liens against the property at the time you made these loans to the Kelseys. Now, speaking with respect to the second mortgage, the \$16,000.00 mortgage, did you personally make any investigation of the records to see whether or not there were liens against the subject property?

A. I didn't because Mr. Kelsey said—this conversation took place in the office of Plummer and Arnell, and Mr. Kelsey, in the presence of Mr. Arnell said, "I will go downstairs where there was an insurance, guaranty insurance company, and have them look up the records," and he did do that.

Q. Is that a title insurance company that you are speaking of? A. Yes, sir.

Q. Now, do you know whether or not Mr. Kelsey got a report from the title insurance company?

A. Yes, he brought it up there before we completed this transaction. [49]

Q. And you say you saw it? A. Yes, sir.

(Testimony of Irene Arnold.)

Q. Did it show any liens?

A. It showed the Heinie Berger lien.

Q. And it showed no construction, just the mortgage lien of Heinie Berger?

A. That is right.

Q. Did it show one lien or two liens on behalf of Berger?

A. It showed two liens.

Q. Those are mortgage liens?

A. Was at the time that I gave him the money to take up those liens.

Q. As far as your first loans are concerned, did you give the money to Mr. Kelsey and tell him to pay it off?

A. He was supposed to go right to the First National Bank and take it up.

Q. And you entrusted him to do that?

A. Yes, I did.

Q. And he did own the property?

A. That is right.

Mr. Bell: Did he say anything about the Ketchikan Spruce Mills having a lien on this property that furnished the material and was used upon the property, of \$250.00 and the last was furnished November 26, 1949, did he mention that one to you? Do you remember whether he mentioned that one or not? [50]

A. I think he did and said he was going to pay that right off.

(Testimony of Irene Arnold.)

Further Cross-Examination

By Mr. Bell:

Q. Now, did he mention to you that Kincaid and King lien for materials in the sum of \$674.00 which was furnished between August 24, 1950, and October 28, 1950, did he ever talk to you about that?

A. No, sir.

Q. Did he ever tell—did you ever know about a mortgage being made to D. H. Cuddy, Trustee, dated August 13, 1951, by R. W. Kelsey and Alice Roberts Kelsey, did he ever talk about that to you?

A. What was the name, please?

Q. Mortgage by Mr. and Mrs. Kelsey to D. H. Cuddy, Trustee, for Pat Ryan, Erma Schuler, V. W. Garrison and Alaskan Plumbing and Heating Co., Inc., of \$4,131.00, did he ever discuss that with you?

A. No.

Mr. McCarrey: I object to any mortgage in 1951, we are talking about December, 1950.

Mr. Bell: I said ever talk to her about it?

Q. (By Mr. Bell): Now, there is a lien, according to the records, by Kenneth [51] W. Luse, between May, 1951 and July 28, 1951, for service and material furnished of \$2,375.05, did you hear any of the Kelseys discuss or talk about that?

A. No, sir.

Q. And these other liens here you never discussed them with the Kelseys in any way?

(Testimony of Irene Arnold.)

A. No, sir, they weren't supposed to exist.

Q. Not at that date, Mrs. Arnold, I mean later as they accumulated from the work going on?

A. No.

Q. Now, when was it that you consented to the City Bank of Anchorage to take that chattel property for their mortgage, about what date was it?

A. I didn't really consent, they didn't ask me. They just went in and did it but I didn't attempt to do anything because I knew that by that time my mortgage was covered with what was there. So they just went in and the Marshal closed the doors, I guess, with their instructions, and they went in and made a public sale of it.

Q. And about when was that? About how long was that before the Kelseys left here?

A. Before they left?

Q. Yes.

A. Why, they had already gone. That is why they did.

Q. Oh, I see, they had gone when you did [52] that?

A. I didn't have the Marshal close the office.

Q. Were you the Trustee in bankruptcy at that time?

A. Not officially, I had just taken it over to try to protect my interests and do something for the tenants that were there, that had just paid him the first and last two months in advance, so they wouldn't lose their money.

(Testimony of Irene Arnold.)

Q. I mean, at the time that they sold this stuff, this hardware, you hadn't been appointed trustee?

A. No, sir, I was just——

Q. You were custodian?

A. I was just custodian and being responsible for the electric lights and \$400.00 some odd dollars to Chugach Electric so they wouldn't cut the electricity off to the tenants that were in there.

Q. And how long did you act in that capacity?

A. I don't know, must have been six or seven months.

Q. Now, did you ever give an account to Mr. McCarrey of the rents you collected during that time?

A. At all times—not on everything.

Q. That is all listed? A. Yes, sir.

Q. And that would be the six or seven months prior to the time you were appointed trustee?

A. That is correct.

Q. I think that is all. [53]

Mr. McCarrey: Mrs. Arnold, I would like to ask one question.

Redirect Examination

By Mr. McCarrey:

Q. Did you consider the \$5,000.00 on the first mortgage mentioned with the second one or did you consider that it was paid?

A. No, it was mentioned.

Mr. McCarrey: Your Honor, I have a title search as of the 20th day of September, 1949, which might be of benefit to you.

(Testimony of Irene Arnold.)

Q. I would like to ask if that is the title search of that property? A. Yes.

Mr. McCarrey: We offer it in evidence, your Honor, as Exhibit No. 8 for whatever value it might be to the Court.

(Thereupon, the document above referred to was entered in evidence as Plaintiff's Exhibit 8.)

Mr. Dunn: I have another question I would like to ask, your Honor. [54]

Recross-Examination

By Mr. Dunn:

Q. Mrs. Arnold, you said that you didn't consider the first mortgage paid by the second mortgage but that you considered that the first mortgage mentioned with the second mortgage. Now, at the time of the execution of the second mortgage did you or did you not accept the promissory note for \$16,000.00 and some odd dollars? A. Yes.

Q. Now, that \$5,000.00 of that \$16,000.00 and some odd dollars—the \$5,000.00 was that represented by the previous promissory note given to you in 1949? A. I didn't understand the question.

Q. Was \$5,000.00 of the \$16,000.00 represented by the note given to you at the time of the execution of the second mortgage, the \$5,000.00 that was represented by the first note that was executed at the time the Kelseys gave you the first mortgage? In

other words, did the \$16,000.00 include the first \$5,000.00? A. Correct, yes, sir.

* * *

(Thereupon, argument was had by the respective counsel.) [55]

United States of America,
Territory of Alaska—ss.

I, Iris L. Stafford, Official Reporter of the above-entitled Court, hereby certify:

That the foregoing is a full, true and correct transcript of the proceedings in the above-entitled matter taken by me in stenograph in open court at Anchorage, Alaska, on June 24, 1953, and thereafter transcribed by me.

/s/ IRIS L. STAFFORD.

[Endorsed]: Filed October 20, 1953. [56]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11(1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rule 75(g)(o) of the Federal Rules of Civil Procedure and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, and including

specifically the complete record and file of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on September 4, 1953, to the United States Court of Appeals at San Francisco, California.

/s/ M. E. S. BRUNELLE,

Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: No. 14157. United States Court of Appeals for the Ninth Circuit. Victor F. Gothberg, an Individual, Doing Business as Gothberg Construction Company, Appellant, vs. Irene Arnold, Appellee; Sullens & Hoss, Inc., a Corporation, Appellant, vs. Irene Arnold, Appellee; United States of America, Appellant, vs. Irene Arnold, Appellee. Transcript of Record. Appeals from the District Court for the Territory of Alaska, Third Division.

Filed December 9, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14157

VICTOR F. GOTHBERG, et al.,

Appellants,

vs.

IRENE ARNOLD, et al.,

Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT G O T H B E R G INTENDS TO RELY ON APPEAL

Comes now defendant-appellant, Victor Gothberg, and states that he intends to rely on this appeal on the points hereinafter designated as follows:

1. That the trial court in this matter erred in its conclusions of law as follows:

(a) In setting up priority of various liens against the property by failing and refusing to prorate the various materialmen's and laborers' claims against the property by failing and refusing to pro laws of the Territory of Alaska.

(b) By allowing as claims prior to the claim of Victor Gothberg, mortgage of D. H. Cuddy, trustee, which mortgage was given as will appear from the records and files in this action for the purpose of securing pre-existing debts now shown to have been lien claims against the premises.

(c) For allowing the claim of Henry W. Cuffel on an attachment against the property now shown

by the record to have been a lienable item against the premises, and in fact, as will appear from the records and files of this action, such suit has not gone to judgment, and Henry W. Cuffel is not entitled to any lien against the premises as against labor and materialmen's liens, including the lien of Victor Gothberg.

(d) For allowing the claim of R. H. and Marie Vore as a claim against the property at all and in particular for allowing such claim as a lien prior to the lien of Victor Gothberg for the reason as will appear from the records and files of this action, such purported lien arose from and by reason of a Commissioner's Court suit commenced by the plaintiffs R. H. and Marie Vore, which judgment was not docketed in the District Court and never became a lien of any kind against the subject property.

(e) That the judgment entered by the court in this matter is erroneous in that it followed erroneous findings and conclusions of law of the court and in that all lien claims against the property arising out of labor and materialmen's liens should have been prorated as provided by law and not in the order of the filing of such liens for the reason that all of such liens, including the lien of the appellant Victor F. Gothberg should have been given priority over mortgages executed against the premises in that such liens were incurred in the alteration and repair of the premises, and by law take priority over mortgages. Appellant further intends to rely upon the point that the mortgage of D. H. Cuddy was a mort-

gage given to secure certain indebtedness owed by the defendants R. W. Kelsey and Alice Roberts Kelsey and was not a proper lien of any kind against the premises as against the lien claims of laborers and materialmen. Appellant Gothberg further intends to rely upon the fact that the judgment in question allows a priority to Henry W. Cuffel upon an attachment levied against the property in a suit which has not been reduced to judgment and that a priority is given to R. H. and Marie Vore on a judgment rendered in the Commissioner's Court, which judgment did not at any time become a lien against the real property which was the subject of the action of Victor F. Gothberg and which real property was sold to create the fund from which payment is here being made.

Appellant Victor F. Gothberg intends to rely upon the statement of facts used by the court in arriving at his findings of fact and conclusions of law together with the transcript of the hearing which took place on June 15 and on June 24 of 1953, and on the various complaints and other documents in the various files which were consolidated in connection with the cause here in question.

Appellant's objection here is not to the statement of facts used by the court, but to the application of the law by the court in attempting to determine the particular priorities of the parties in connection with this action, and appellant Gothberg claims that he is entitled to participate in the distribution pro rata with the other lien claimants for laborers and

materialmen's liens and prior to any distribution to the mortgagees or judgment creditors or attachment lienholders.

Dated at Anchorage, Alaska, this 8th day of February, 1954.

DAVIS, RENFREW & HUGHES,
Attorneys for Appellant,
Victor Gothberg;

By /s/ EDWARD V. DAVIS.

Receipt of copy acknowledged.

[Endorsed]: Filed February 11, 1954.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT SULLENS & HOSS, INC., A CORPORATION, RELIES FOR REVERSAL ON APPEAL

1. The trial court erred in this matter in its Findings of Fact and Conclusions of Law, as follows:

a. In setting up priorities of various liens against the property and failing and refusing to prorate the various lien claims against the said property in question, as provided by the laws and decisions of the courts affecting the Territory of Alaska.

b. By allowing the claim of D. H. Cuddy, Trustee, for the reason that there was no just cause for this being set up as a prior lien of any kind.

c. By allowing the claim of R. H. and Marie Vore as a claim against the property at all; that the records and stipulation showed a state of facts that did not entitle them to a lien on the property at all, for the reason that a judgment in a commissioner's court suit, not docketed in the District Court, does not arise to the dignity of a lien of any kind against real estate.

2. That the Judgment entered by the Court in this matter is erroneous in that it followed erroneous findings of fact and conclusions of law of the Court, and in that all lien claims against the property, arising out of labor and material liens and the judgment lien of this Appellant, were prior to one of the mortgages of Irene Arnold as far as the lien was concerned, in that her mortgage was not properly executed to become a valid lien on the property at all.

3. That the lien of D. H. Cuddy, as Trustee, was given to secure the personal debts of R. W. Kelsey and Alice Roberts Kelsey, and was not a proper lien of any kind against the premises, insofar as it affected any of the other lien claimants, including the judgment lien claimant, Sullens & Hoss, Inc.

4. That the judgment rendered was not based upon any evidence in the case, over the objection of Sullens & Hoss, Inc., who asked permission of the Court to make proof on its case, and offered to prove its case, which would have, if permitted, established the fact that the property was originally purchased by R. W. Kelsey who had the property placed in the

name of his wife, Alice Roberts Kelsey, for the purpose of keeping his creditors from attaching it, and that the property was paid for completely by R. W. Kelsey and was built by his labor and was his property at all times; that he had complete control over it; that Alice Roberts Kelsey had no interest in the property other than being the wife of R. W. Kelsey; that said property became the homestead of R. W. Kelsey and, therefore Alice Roberts Kelsey had an interest therein to that extent only; that the lien filed by Sullens & Hoss, Inc., was never paid and released, but a similar amount of money was paid with the understanding that the lien would be released if the mortgage prepared and submitted by Sullens & Hoss, Inc., was executed; and that R. W. Kelsey and Alice Roberts Kelsey agreed to execute and deliver said mortgage and took it into their possession for execution and failed to return it to Sullens & Hoss, Inc., and were, therefore, notified that the amount of money that they had deposited in the law office of Bell & Sanders, would be applied on the judgment and the lien would not be released, and that no objection was made to the application of said funds on the judgment by either R. W. Kelsey or Alice Roberts Kelsey. All of the evidence was rejected, and at the same time Sullens & Hoss, Inc., objected to any judgment being rendered unless evidence was introduced to establish the right of judgment, it being noted that Sullens & Hoss, Inc., did not agree to the stipulation as filed. And since no evidence was introduced and no one offered to introduce evidence except Sullens & Hoss,

Inc., there was no foundation of a judgment in favor of anyone in this case except Sullens & Hoss, Inc.

5. The Court erred in admitting evidence at the hearing which was objected to by Sullens & Hoss, Inc.

6. The Court erred in granting Irene Arnold a prior lien for the sum of \$5,000.00, based upon a mortgage that was not executed according to law; it was not signed by the opposite spouse and it was a mortgage purported to be upon the homestead property of R. W. Kelsey and Alice Roberts Kelsey, which mortgage was void upon its face and was insufficient to create a lien upon the particular real estate here.

a. The Court erred in allowing a lien to No. 2, commencing on page two of the Findings of Fact and Conclusions of Law, as follows:

a. The Court erred in allowing a lien to No. 2, Ketchikan Spruce Mills, in the amount of \$250.00 principal, plus interest of \$56.50, and filing costs and attorney's fees;

b. The Court erred in allowing a lien to No. 3, Kincaid & King Construction Co., in the amount of \$408.25, plus interest, costs and attorney's fees;

c. The Court erred in allowing a lien to No. 4, Heinie Berger, in the amount of \$1,959.22, plus interest, and attorney's fees, for the reason that no proof was offered as to the balance due on said Note and Mortgage, if any;

d. The Court erred in allowing a lien to No. 5, Irene Arnold, in the amount of \$10,344.81, plus in-

terest of \$1,784.07, and attorney's fees, and making it a prior lien to all of the other liens named in the action.

e. The Court erred in rendering judgment for certain lien claimants Nos. 6 through 15, in said Findings of Fact and Conclusions of Law on Page three thereof, since no evidence was offered to support said liens.

8. The Court erred in failing and refusing to grant Sullens & Hoss, Inc., a lien based upon its judgment against the Defendant, which Judgment was duly entered of record in the District Court at Anchorage, Alaska, Third Judicial Division, in the sum of \$1,676.89 principal, \$125.70 interest, \$230.00 attorney's fees, and \$30.00 court costs, in Cause of Action No. 5504, which Judgment was rendered in the District Court on the 9th day of December, 1949, when it was alleged in the Cross-Complaint of Sullens & Hoss, Inc., that R. W. Kelsey and Alice Roberts Kelsey were then and there partners associated together in operating the business of Spensard Lumber Company and Mountain View Lumber Company, and that the said Thomas Kelsey referred to in the above-mentioned judgment is one and the same person as R. W. Kelsey.

9. The Court erred in overruling the objection of Sullens & Hoss, Inc., found on page 33 of the typewritten transcript of the Court below, as follows:

“A. Well, Mr. Kelsey said that Mr. Heinie Berger held a mortgage——

“Mr. Bell: Object to the statement as not responsive to the question. He asked what the instrument was.

“Q. Can you explain?”

“The Court: I think you asked what the circumstances were in making something of that kind. Well, as I have ruled so many times, the objection that the answer is not responsive may be made only by the person conducting the examination * * *”
(Emphasis Supplied.)

10. The Court erred in allowing a judgment lien in favor of Irene Arnold for the sum of \$5,000.00, plus interest, costs and attorney’s fees in one instance, and \$10,344.81, plus interest and attorney’s fees in another instance, for the reason that her testimony shows that she loaned altogether \$16,609.51, \$5,000.00 of which was not lienable at all because it was on a mortgage on homestead property without the signature of the opposite spouse, and she admitted in her examination that she had received while handling the property before she was elected Trustee, a sum of \$18,000.00. (See typewritten transcript, Page 41.) This amount overpaid any loan she had made and she therefore had nothing whatsoever coming to her, and if she wrongfully spent or dissipated this money, she made no showing or justification of the spending of it, and is therefore barred from recovering anything whatsoever. She also admitted that she had not filed a final account with the Referee in Bankruptcy for the \$6,000.00 that she collected after she became Trustee in Bankruptcy.

11. The Court erred in rendering Judgment in this action foreclosing the mortgages and liens without first procuring the disclaimer or consent of the Bankruptcy Court who had jurisdiction in the Bankruptcy suit filed by R. W. Kelsey and Alice Roberts Kelsey, and all actions taken by the District Court, in the Judgment here, are without jurisdiction until cleared through the Bankruptcy proceedings.

12. The Court further erred in allowing Irene Arnold priority over other liens when she admitted her loans were construction loans made for that purpose with full knowledge that the building was being constructed and that building material and labor were being expended thereon. Therefore, her lien, if any, is inferior to all other liens involved herein.

13. The Court further erred in not allowing Sullens & Hoss, Inc., a first and prior lien to all other liens, since its judgment was rendered on the 9th day of December, 1949, and was prior in date and prior in right to all other liens, since all other valid liens date subsequent to that time.

Dated at Anchorage, Alaska, this 9th day of February, 1954.

BELL & SANDERS,

By /s/ BAILEY E. BELL,

Attorneys for Appellant,

Sullens & Hoss, Inc.

Service of copy acknowledged.

[Endorsed]: Filed February 15, 1954.

